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## Remix without Romance

Thomas W. Joo

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## Article

### Remix Without Romance

THOMAS W. JOO

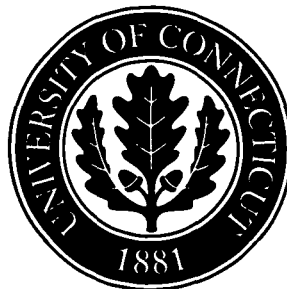
*A dominant argument in intellectual property scholarship asserts that technologies such as digital copying empower individuals to participate in the making of culture. Such participation involves individuals appropriating cultural material, "remixing" it with other elements, and "recoding" it by assigning it alternative meanings. By enabling more people to participate in culture, remixing and recoding supposedly enhance "semiotic democracy" and mitigate the dominance of the media industry. The same theorists who make this argument also tend to assert that copyright law is in need of significant reform because it inhibits recoding and thus stifles semiotic democracy.*

*This Article challenges the empirical assertion that law inhibits recoding—but it also questions the normative assumption that recoding is presumptively good for semiotic democracy. This Article focuses on a specific type of recoding: musical sampling (that is, the recoding of music through digital copying and other means). Sampling, particularly in hip-hop music, is frequently cited as a paradigmatic example of recoding that has been inhibited by intellectual property law. The legal history of sampling, however, suggests otherwise. Commentators have misread important judicial opinions about sampling and misunderstood the business practices of the music industry. At least in the sampling context, law has not prevented the reallocation of recoding rights by contract.*

*While markets have been able to reallocate sampling rights, however, such transactions do not necessarily advance semiotic democracy, because market failures afflict the marketplace of ideas. In the cultural context, as in the political and economic contexts, formally equal opportunity to participate does not result in equality of influence, and can in fact exacerbate power imbalances. For example, legal and technological innovations (such as digital copying and the Internet) can enable cultural underdogs to recode the messages of media conglomerates and other dominant cultural institutions. But those same innovations also allow dominant institutions to appropriate from the underdog—and dominant institutions can then use their influence to "drown out" those independent voices with recoded meanings. Moreover, recoding by its nature involves the incorporation and repetition of dominant cultural messages. Such repetition can propagate and reinforce dominant messages, resulting in the cooptation of recoding, regardless of the recoder's intent. In short, recoding is not clearly conducive to semiotic democracy. Rather, it is full of internal contradictions that make its relationship to semiotic democracy an ambivalent one.*

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# Remix Without Romance

THOMAS W. JOO\*

## I. INTRODUCTION: “RECODING” AND “SEMIOTIC DEMOCRACY”

In recent years, intellectual property theorists have advanced the argument that the law should be designed to foster broad popular participation in cultural production. Many adherents of this vision refer to it as “semiotic democracy.” Michael Madow, for example, applies the term to refer to an aspirational “society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values.”<sup>1</sup> William Fisher writes that individuals in such a society “would be able to participate in the process of making cultural meaning. Instead of being merely passive consumers of images and artifacts produced by others, they would help shape the world of ideas and symbols in which they live.”<sup>2</sup> According to Fisher, “[a]ctive engagement of this sort would help both to sustain several of the features of the good life—e.g., meaningful work and self-determination—and to foster cultural diversity.”<sup>3</sup>

A significant roadblock to semiotic democracy is the fact that a relatively small number of multinational media enterprises dominate the channels of cultural distribution,<sup>4</sup> such as television, publishing, and recorded music. Many of these same enterprises also hold copyrights in many influential cultural properties. A number of prominent legal scholars argue that legal reform, including reducing the scope of copyright, can mitigate this concentrated cultural influence enjoyed by the “culture

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<sup>1</sup> Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 146 (1993).

<sup>2</sup> William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 168, 193 (Stephen R. Munzer ed., 2001).

<sup>3</sup> William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217–18 (1998) (footnote omitted).

<sup>4</sup> See LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 263 (2001).

industry.”<sup>5</sup> Lawrence Lessig has loosely labeled this aspirational reform “free culture.”<sup>6</sup> According to this view, the public actively participates in culture by appropriating these dominant cultural properties and “recoding” them—that is, by challenging their proffered meanings and assigning new ones.<sup>7</sup> Digital copying technology and the Internet have made it possible to “remix”<sup>8</sup> and re-disseminate appropriated cultural materials with just a point and a click.

Intellectual property law, however, empowers “owners” to prevent many forms of appropriation. Most copyright scholars agree that this power is inimical to semiotic democracy, and that reforming the law<sup>9</sup> to facilitate cultural recoding will advance semiotic democracy.<sup>10</sup> For example, Rosemary Coombe, perhaps the first to use the term “semiotic democracy” in the context of intellectual property law, argued that excessive intellectual property protections interfere with a “quintessentially human” quality: “the capacity to make meaning, challenge meaning, and transform meaning . . . .”<sup>11</sup> According to Michael Madow, the law should encourage recoding in order to “align itself with cultural pluralism and popular cultural production.”<sup>12</sup> This Article questions this emerging orthodoxy. Cultural innovation and participation can reach accommodation with intellectual property law and even benefit from it. Furthermore, the liberalization of appropriation rights may have harmful

<sup>5</sup> The term “culture industry” refers to the mass commercial production of arts and entertainment that began in the late nineteenth century. The so-called Frankfurt School of cultural criticism coined the term in the 1930s. See Madow, *supra* note 1, at 129 n.8.

<sup>6</sup> LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004). Lessig argues for less legal regulation of the “ways . . . ordinary individuals share[] and transform[] their culture.” *Id.* at 8.

<sup>7</sup> See Rosemary J. Coombe, *Colloquy, Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853, 1863–64 (1991).

<sup>8</sup> “A remix (or mash-up) is a work created from one or more preexisting works—such as music, photos, videos, computer games, etc.” Robert P. Merges, *Copyright, Creativity, Catalogs: Locke Remixed* ;-, 40 U.C. DAVIS L. REV. 1259, 1259 (2007); see also LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* 69 (2008); Madhavi Sunder, *IP*<sup>3</sup>, 59 STAN. L. REV. 257, 263 (2006) (describing a “‘Participation Age’ of remix culture, blogs, podcasts, wikis, and peer-to-peer filesharing” that “views intellectual properties as the raw materials for its own creative acts”).

<sup>9</sup> The pioneering legal scholarship on semiotic democracy applied the concept to trademark and the right of publicity, as well as to copyright. See, e.g., Madow, *supra* note 1 (addressing publicity).

<sup>10</sup> See SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS* 4–5 (2001) (arguing that intellectual property law unnecessarily protects works already in existence at the expense of limiting future works); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547, 630 (2006) (advocating borrowing as a norm of musical practice that should be protected by copyright law); Fisher, *supra* note 2, at 168 (providing a survey of intellectual property theories); Fisher III, *supra* note 3, at 1203 (arguing for laws designed to facilitate and reinforce the shift from intellectual property laws to contractual rights by creators of intellectual products suitable for distribution over the internet).

<sup>11</sup> Coombe, *supra* note 7, at 1879 (footnote omitted).

<sup>12</sup> Madow, *supra* note 1, at 239.

effects on semiotic democracy as well as beneficial ones.

This Article focuses on a form of recoding and remixing widely celebrated by intellectual property scholars: the incorporation of copyrighted musical compositions and/or recordings into new musical works through means such as digital sampling. This type of appropriation, which this Article refers to generally as “sampling,” is the basis of countless pieces of popular music, and is closely identified with the hip-hop (or rap)<sup>13</sup> genre that has become a dominant force in popular culture worldwide. The hip-hop era has coincided with the digital age, and hip-hop has become closely identified with recoding and particularly digital remixing. Indeed, the term “remix,” which today is often used to refer to recoding practices in general, derives from pop music, where it has been used for decades to refer more narrowly to re-edited versions of records in hip-hop, disco, and other genres.<sup>14</sup> Pop records are typically produced by “mixing” together multiple separately recorded elements (i.e., the vocals and the various instruments). The term “remix” originated to describe an alternative version of a record (typically a more danceable version intended for nightclubs) made up of those constituent recorded elements reassembled in a different way and combined with additional elements.<sup>15</sup>

As noted above, “free culture” scholars insist that copyright laws that burden recoding are inherently harmful to individual expressive freedom, and that lifting such laws will necessarily increase semiotic democracy. This thinking has influenced two important assertions that “free culture” theorists tend to make about hip-hop and sampling. First, most scholars writing in the area assert that copyright law has been destructive of recoding in hip-hop music and thus of semiotic democracy.<sup>16</sup> Second, most “free culture” scholars further believe that a legal regime that is more permissive of cultural appropriation, such as sampling, will necessarily

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<sup>13</sup> The term “rap” more precisely refers to hip-hop music that incorporates spoken, or “rapped,” vocals, but the terms tend to be used interchangeably.

<sup>14</sup> See *The Remixmasters: A History Lesson for Puffy Combs*, SLATE.COM, [http://www.slate.com/articles/arts/music\\_box/2002/07/the\\_remixmasters.html](http://www.slate.com/articles/arts/music_box/2002/07/the_remixmasters.html) (last visited Nov. 30, 2011).

<sup>15</sup> This practice typically did not implicate copyright disputes. In the pre-digital age, creating such remixes required obtaining the master tapes, which could only be done with the cooperation of the record company that owned and possessed the tapes. See, e.g., Andy Kellerman, *Tom Moulton*, ALLMUSIC.COM, <http://www.allmusic.com/artist/p107949/biography> (describing how Tom Moulton produced one of the first American remix records in the 1970s after a record company executive “handed Moulton a copy of the master [tapes] for Don Downing’s ‘Dream World,’ a song that had already been issued as a single”). By the time American record producers began experimenting with remixes, Jamaican DJs of the 1960s had already pioneered the practice, which they called “dub.” See JEFF CHANG, *CAN’T STOP, WON’T STOP: A HISTORY OF THE HIP-HOP GENERATION* 29–30 (2005).

<sup>16</sup> See, e.g., VAIDHYANATHAN, *supra* note 10, at 143–44; Arewa, *supra* note 10, at 630 (“[T]he question of whether and how sampling should be permitted is in some measure an inquiry about how and to what extent hip hop can and should continue to exist as a musical form.”).

contribute to greater semiotic democracy.<sup>17</sup> But these arguments paint an excessively romantic picture of recoding and remixing as victims of legal persecution and symbols of democracy.

With respect to the first assertion, many intellectual property scholars argue that after a long tradition of benignly neglecting recoding, copyright law shifted direction in recent decades to inhibit appropriation generally and sampling specifically.<sup>18</sup> The historical record refutes this claim, however. Legal scholars, perhaps understandably, have overemphasized the influence of law and underestimated the ability of artistic and business communities to adapt to it. Sampling and its predecessor forms of musical recoding developed in the presence of copyright law and reached accommodation with it—even in the absence of judicial decisions. By the time courts explicitly stated that sampling requires copyright clearance, they were not imposing new rules on the music industry, but only confirming practices that the music business had been following since the earliest days of recorded hip-hop—and even before.

This Article next challenges the second, more normative assertion—that actively facilitating recoding would further semiotic democracy. While this Article argues that recoding can flourish despite copyright law, it is skeptical of recoding's supposed benefits to semiotic democracy. Intellectual property scholars insist that recoding furthers semiotic democracy (and copyright law harms it) because they view recoding solely as an autonomous act of individual expression. This position is consistent with liberal pluralism's analytical focus on the individual actor, as well as its descriptive and normative commitment to individual autonomy, particularly to formally equal freedom to engage in speech and other forms of expression. Under this view, the absence of legal constraint is both necessary and sufficient to empower individuals to overcome domination and achieve self-realization. Thus, formally equal rights to participate in cultural and political dialogue—such as a right to recode via remixing—are the necessary and sufficient response to the concentration of cultural influence. For example, although antitrust law has permitted the current concentration of media power that concerns so many intellectual property commentators, Lawrence Lessig has argued that increased expressive opportunities (such as Internet access and the right to use copyrighted materials) are sufficient to counteract media concentration and that reform

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<sup>17</sup> See, e.g., VAIDHYANATHAN, *supra* note 10, at 138 (“Digital sampling also had a powerful democratizing effect on American popular music.”); Arewa, *supra* note 10, at 630 (advocating borrowing as a norm of musical practice that should be protected under copyright law).

<sup>18</sup> See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 148 (2008) (stating that sampling decreased dramatically as licenses were required for all musical segments); VAIDHYANATHAN, *supra* note 10, at 141–44 (asserting that copyright case law increased the cost of sampling and had a stifling effect on creativity in rap music).

of antitrust policy is unnecessary.<sup>19</sup>

But the liberal foundation of “free culture” theory is a historical irony, for the concepts of “recoding” and “semiotic democracy” actually originated as *critiques* of liberal pluralism. The originators of these theories argued that recoding has an ambivalent—if not complicit—relationship to structures of domination. They saw the power of cultural establishments, such as the concentrated entertainment industry, as structurally embedded and durable. Under this view, formally equal opportunity to create alternative meanings is insufficient to correct substantive inequalities in cultural influence. The version of “semiotic democracy” theory in today’s legal academy fails to address, or even to meaningfully engage, this central insight of the original theory. Yet this argument is even more compelling today in view of the highly concentrated nature of the culture industry. Although the Internet and other digital technologies offer new opportunities for individual participation, established forms of media maintain their dominance.<sup>20</sup> Furthermore, new technologies offer new opportunities to media conglomerates as well as to individuals.

The remainder of this Article develops the foregoing arguments as follows. Part II is primarily concerned with the first argument—that scholars overstate the destructive effect of copyright law. Part II provides a brief legal history of musical appropriation in hip-hop music. Intellectual property commentators writing in the “free culture” vein insist that the essence of hip-hop is copying,<sup>21</sup> and that it thus exists in opposition to mainstream culture and norms of intellectual property.<sup>22</sup> But the historical record shows that long before the hip-hop era, recoding practices in the pop music industry developed in concert with copyright law. Despite the absence of judicial decisions, the industry developed norms of obtaining copyright permission and setting permission fees by contract. When hip-

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<sup>19</sup> See LESSIG, *supra* note 4, at 110. Lessig is, of course, a pioneer of the insight that technology, as well as law, enables the dominant position of the culture industries. For example, he has identified encryption technology as a threat to creativity. See, e.g., LESSIG, *supra* note 6, at 156–57. His policy analysis of encryption, like his views on antitrust, reflect his confidence in formal equality. Ultimately, his complaint is not with encryption technology per se, but laws (such as the Digital Millennium Copyright Act) that prevent the circumvention of encryption. *Id.* at 157. This position implies that enabling competition between hackers and industry would be sufficient to overcome the negative effects of encryption.

<sup>20</sup> According to a survey conducted in 2011 by the ANA (Association of National Advertisers), “Television is still the top media platform for advertisers. . . . 64 percent of [business-to-consumer] marketers reported that their television budget has increased over the past two years.” *TV Is Still the Top Media Choice for Advertisers* (Press Release by Association of National Advertisers), States News Service, Oct. 24, 2011, available at <http://www.ana.net/content/show/id/22187>.

<sup>21</sup> See LESSIG, *supra* note 4, at 9 (asserting that rap music is built upon “ripping” and “sampling . . . the music of others”).

<sup>22</sup> See VAIDHYANATHAN, *supra* note 10, at 133 (asserting a clash between the hip-hop tradition of sampling and American copyright law).



hop came on the scene, the same norms applied; neither artists nor record companies saw it as fundamentally different from prior recoding practices. Hip-hop generally, and sampling techniques specifically, have developed despite, and perhaps even because of, intellectual property law.

Copyright scholars are in general agreement that a 1991 opinion, *Grand Upright Music v. Warner Bros. Records*,<sup>23</sup> suddenly and radically changed the legal status of sampling by declaring that sampling without copyright permission constitutes infringement. This general understanding is, in fact, a gross misconception of the opinion. *Grand Upright* did not even present the question of whether unlicensed sampling would constitute infringement, because the defendants conceded that it would.<sup>24</sup> Indeed, the historical record, including the court records in *Grand Upright* itself, shows that the hip-hop community, from its earliest days, generally understood and respected the obligation to obtain and pay for permission to use samples in commercial recordings.

Part III of this Article focuses on the second argument—that recoding has an ambivalent relationship to semiotic democracy. Even assuming copyright law discourages cultural appropriation, that would not necessarily harm semiotic democracy. Increased appropriation can have negative as well as positive effects on the dispersion of semiotic influence. Because it enables the recoding of cultural products, a legal regime that facilitates appropriation can disperse the power to make meanings—what this Article will refer to as “semiotic power.” But it can also encourage activity that contributes to the *concentration* of semiotic power—that is, it can have the very “constraining” effect on cultural dialogue that Coombe deplores.

Indeed, exercising a “right” to recode may empower dominant culture as well as challenge it. Not all borrowing of cultural products constitutes autonomous meaning-making by individuals. For example, permitting recoding without copyright permission enables individuals to freely appropriate from the powerful culture industries, but it also enables appropriation in the reverse direction. Furthermore, individuals who recode may assign *new* meanings to dominant cultural products, but they cannot easily displace the *existing* meanings. Thus recoding re-disseminates those existing meanings and reaffirms their importance. Those who borrow from the culture industries, even to criticize them, engage in a discourse on terms set by the culture industry.<sup>25</sup> By selecting

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<sup>23</sup> 780 F. Supp. 182 (S.D.N.Y. 1991).

<sup>24</sup> See *infra*, Section II.A.3. The case was actually about whether the plaintiffs had proven ownership of the relevant copyrights and whether the defendant samplers had tried in good faith to obtain permission. See *id.*

<sup>25</sup> Cf. Stuart Hall, *Notes on Deconstructing “The Popular”*, in *PEOPLE’S HISTORY AND SOCIALIST THEORY* 227, 233 (Raphael Samuel ed., 1981) (“[T]he cultural industries do have the power . . . by

from and further repeating the cultural materials preselected by the culture industry, recoding can simultaneously undermine *and* further concentrate the cultural influence of the already dominant culture industry. For example, sampling existing popular music and incorporating it into new hip-hop music is sometimes described as a challenge to dominant musical culture and the music industry,<sup>26</sup> but sampling also re-disseminates existing music and extends its cultural influence.

Liberal legal theory tends to have difficulty with this kind of internal contradiction. Indeed, intellectual property scholars tend to see a dualistic, if not Manichaean, struggle between oppressive laws on the one hand and autonomous recoding on the other.<sup>27</sup> The tension between domination and autonomy, however, expresses itself not solely *between* copyright law and recoding, but also *within* copyright law and *within* recoding.

## II. LEGAL DOMINATION?

### A. *Business Practice and the Limits of Legal Domination*

The narrative of a battle between copyright and hip-hop is an overdramatized myth that ignores the actual history of the interaction between law and musical recoding. Art (and the business of art) can reach accommodation with the law; indeed it has done so, allowing art to flourish in harmony with the law. In fact, the tension between legal restrictions and creative energy can be a productive one. After all, copyright law does not constitute a *prohibition* on cultural appropriation. It merely assigns it a *price*—just as every aspect of artistic production, from guitars to paintbrushes, has a price.<sup>28</sup> Sampling in hip-hop, like earlier kinds of

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repetition and selection, to impose and implant such definitions of ourselves as fit more easily the descriptions of the dominant or preferred culture.”).

<sup>26</sup> See VAIDHYANATHAN, *supra* note 10, at 137 (“[S]ampling . . . can be a political act—a way of crossing the system . . .”).

<sup>27</sup> Michael Madow, for example, argues that deciding whether to protect the right of publicity “requires us to make a fundamental choice . . . between centralized, top-down management of popular culture on the one hand, and a more decentralized, open, ‘democratic’ cultural practice on the other.” Madow, *supra* note 1, at 239.

<sup>28</sup> Opponents of strong copyright protection typically argue that intellectual property is different from these kinds of goods because intellectual property is “nonrivalrous.” In other words, as one leading commentator put it, “my use of an idea does not impose any direct cost on you . . . . Precisely because its consumption is nonrivalrous, information does not present any risk of the tragedy of the commons. It simply cannot be ‘used up.’” Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1050–51 (2005). But your copying of my intellectual property, such as my music, *can* impose direct costs on me and “use up” its economic value. The most obvious example is if you manufacture and sell unauthorized copies that displace my own sales. The “nonrivalrous good” argument depends on question-begging as well. For example, the assertion that you should be able to freely sample my music because doing so “does not impose any direct cost” on me only makes sense if you assume that I do not have the exclusive right to exploit my work. (To be fair, the assertion

musical borrowing, did not develop in some mythical golden age in which intellectual property was unregulated. Rather, it (and its many antecedents) developed within a copyright regime fundamentally like today's.

The slow pace of the law means that it tends to lag behind artistic innovation rather than run ahead of it. This tends to limit the law's role to settling disputes over the proceeds from established practices. It simply arrives too late to prevent new methods of making meanings. In the meantime, art and business can develop a balance between new practice and existing law. One influential commentator argues that sampling in hip-hop "revealed gaping flaws in the premises of how copyright law gets applied to music . . . ."<sup>29</sup> But in fact, there were no such "gaping flaws." Musical recoding thrived, copyright law notwithstanding, long before the advent of hip-hop. Neither courts nor the music industry found sampling in hip-hop to be significantly different from existing forms of recoding, and thus it caused no legal upheaval.

### 1. *Public Performance and the Birth of Hip-hop*

Law in the United States has regulated the appropriation of copyrighted music at least since the early twentieth century, but these burdens have not prevented the development of recoding practices in hip-hop or in other musical genres. For example, since the Copyright Act of 1909, copyright in a musical composition has included the exclusive right to control "public performance for profit" of the work.<sup>30</sup> Nonetheless, the earliest hip-hop music involved disc jockeys ("DJs") publicly playing and recoding copyrighted recorded music at for-profit dance parties.<sup>31</sup> DJ Kool Herc (Clive Campbell)'s 1973 DJ show has become a "creation myth" of hip-hop.<sup>32</sup> He is credited with inventing the practice of manipulating vinyl records to repeatedly play partygoers' favorite portions of a song.<sup>33</sup> Similar turntable manipulation allowed the creation of collage-like mixes made up of portions of multiple records.<sup>34</sup> Other DJs created the technique of moving a record under the needle to distort the recording into rhythmic

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that sampling requires my permission because it does impose a direct cost on me is just as circular, as it depends on the assumption that I *do* have such rights.)

<sup>29</sup> VAIDHYANATHAN, *supra* note 10, at 133.

<sup>30</sup> Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075, 1076, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 106 (2006)).

<sup>31</sup> Furthermore, music was only one part of "hip-hop," a subculture that also involved dance and graffiti—activities which did not attract the attention of copyright law, probably because they never came to implicate the amount of money involved in commercial recordings. See THE ANTHOLOGY OF RAP 2-4 (Adam Bradley & Andrew DuBois eds., 2010) (discussing DJ Kool Herc's influence on the origin of rap music, and the surrounding culture that emerged).

<sup>32</sup> CHANG, *supra* note 15, at 67.

<sup>33</sup> *Id.* at 78-79.

<sup>34</sup> Tricia Rose, *Rap Music*, in THE HIP HOP READER 17, 17 (Tim Strode & Tim Wood eds., 2008).

“scratching” sounds.<sup>35</sup> The use of records and turntables as musical instruments is sometimes considered its own subgenre of hip-hop, now sometimes referred to as “turntablism.”<sup>36</sup> While the DJ played records, a master of ceremonies (“MC”) would sometimes use the microphone to encourage dancers; this practice is one of the forerunners of rap.<sup>37</sup>

Copyright law entitled the owners of recorded compositions to control DJs’ public performances of the records. Yet this rule did not inhibit semiotic democracy as expressed through the grass-roots innovations of DJs.<sup>38</sup> Copyright law notwithstanding, live hip-hop became a vibrant and influential musical form in the 1970s.<sup>39</sup>

## 2. *Reproduction, Derivative Works, and Hip-hop Recordings*

The incorporation of copyrighted music into a new recording (through sampling, for example) does not involve public performance, but it implicates different intellectual property rights—the rights of a copyright holder to control reproductions and derivative works. The holder of copyright in a musical composition has enjoyed the exclusive right to “publish, copy and vend the copyrighted work,” as well as “to arrange or adapt it” at least since the Copyright Act of 1909.<sup>40</sup> For at least a century, then, the copyright in a musical composition has included a right to control recordings that recode the composition. The Copyright Act of 1976, the backbone of the current copyright code, reaffirmed the copyright owner’s exclusive right to “adapt” under the rubric of the exclusive right “to prepare derivative works based upon the copyrighted work.”<sup>41</sup>

<sup>35</sup> See CHANG, *supra* note 15, at 114 (describing the advent of the scratch).

<sup>36</sup> See, *turntablism: beat juggling & scratching*, TURNTABLISM.COM, <http://turntablism.com.au/> (last visited Oct. 6, 2011).

<sup>37</sup> See CHANG, *supra* note 15, at 78; Rose, *supra* note 34, at 20–21.

<sup>38</sup> The extent to which copyright holders actually asserted this right is unclear. So-called “performing-rights agencies” such as ASCAP and BMI typically collect public-performance royalties from performance venues on behalf of copyright holders. Collecting performance rights royalties from smaller venues has long been notoriously difficult, as it involves painstaking fieldwork and resistant venue owners. John Bowe, *The Copyright Enforcers*, N.Y. TIMES MAG., Aug. 6, 2010, at 38.

<sup>39</sup> See CHANG, *supra* note 15, at 151, 168 (describing the influence of hip-hop on New York’s art and punk cultures).

<sup>40</sup> Copyright Act of 1909, Pub. L. No. 60-349, §§ 1(a), 1(b), 35 Stat. 1175, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 106 (2006)).

<sup>41</sup> Copyright Act of 1976, Pub. L. No. 94-553, §106, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 106). A derivative work is

a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of . . . modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

A recording of a composition implicates both the copyright in the composition and a separate copyright in the recording itself. Sound recordings first became copyrightable in 1972, around the time of the advent of hip-hop.<sup>42</sup> The rights associated with copyright in a sound recording, however, differ somewhat from those associated with copyright in a composition. Under the 1976 Act, the owner of the copyright in a sound recording has exclusive rights over reproduction and derivative works, but these rights extend only to use of the actual sounds captured on the recording.<sup>43</sup> Thus, an unauthorized recording of a similar-sounding new performance does not infringe upon the copyright in a sound recording (though it might infringe the copyright in the underlying composition). As this Article will show, hip-hop records have both used sound-alike performances and taken the actual sounds from recordings (through the recording of DJ performances, tape manipulations, and digital sampling). Despite their technical and legal differences, these are all appropriations that potentially infringe upon copyrights. Thus, for convenience, this Article will refer to all of these methods of borrowing as “sampling.”

As with recoding in public performances, then, copyright law puts burdens on recorded musical recordings. Yet the law did not prevent the rise of such recordings. For example, long before the hip-hop era, Chuck Berry’s publisher threatened to sue the Beach Boys for copying the melody of his 1958 composition “Sweet Little Sixteen” in their 1963 song “Surfin’ USA.” This resulted in an out-of-court settlement (and writing credit for Berry).<sup>44</sup>

Technological appropriations from sound recordings—and legal responses thereto—also predate hip-hop. Beginning with the 1956 hit “The Flying Saucer,” Bill Buchanan and Dickie Goodman produced a long series of novelty comedy records that included dialogue assembled from snippets of pop hits. They were sued by multiple music publishers who alleged infringement of the copyrights in the underlying compositions. The parties reached an out-of-court settlement that entitled the publishers to royalties.<sup>45</sup> Goodman continued to make these collage-like records for

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*Id.* § 101.

<sup>42</sup> David Dante Troutt, *I Own, Therefore I Am: Copyright, Personality, and Soul Music in the Digital Commons*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 373, 375 (2010) (citing Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 1, 5, 19, 20, 26, 101)). The copyright in a sound recording, however, did not, and still does not, confer any right to control public performance of the recording. *See id.* at 422–23 (citing 17 U.S.C. § 114(a)). Thus, unlike the owners of compositions (typically music-publishing companies), the owners of sound-recording copyrights (typically record labels) have no right to control DJ performances.

<sup>43</sup> 17 U.S.C. § 114(b).

<sup>44</sup> PHILIP LAMBERT, *INSIDE THE MUSIC OF BRIAN WILSON* 11, 64 (2007).

<sup>45</sup> *See* Chuck Miller, *Dickie Goodman: We’ve Spotted the Shark Again*, CHUCKTHEWRITER.COM, <http://www.chuckthewriter.com/goodman.html> (last visited Sept. 11, 2011) (originally published in a

decades; indeed, he had a Top Ten hit during the formative years of hip-hop with his 1975 solo record, "Mr. Jaws."<sup>46</sup> The influential hip-hop producer Steinski (Steve Stein) cites Buchanan and Goodman as direct influences on the sampling techniques of hip-hop.<sup>47</sup>

The long history of copyright owners' control of reproduction and derivative works did not prevent the development of recordings based on appropriation. Rather, it simply led to a business practice of paying for permission to recode copyrighted compositions, just as an artist would pay other contributors to a recording, such as studio musicians or recording engineers. Whether this was a doctrinally correct interpretation of copyright law is open to debate. As many commentators argue today, musical appropriations that involve significant recoding may fall under the "fair use" exception to copyright protection, a doctrine that dates at least back to 1869.<sup>48</sup> But right or wrong as a doctrinal matter, copyright holders' insistence on payment did not prevent the use of recoding in pop records. The later development of sampling in recorded hip-hop is, as Steinski recognizes, merely a continuation of an established artistic practice. Both turntablism and rap music made the transition from live performance to records, and the existing business practice of paying for permission to appropriate was, quietly and unremarkably, extended to hip-hop records. Indeed, the practice dates to the very first commercially successful hip-hop record—yet it did not prevent hip-hop from becoming a dominant artistic and commercial force in popular music.

In 1979, Sugarhill Records released "Rapper's Delight" by the Sugarhill Gang, the first hip-hop single to become a national hit.<sup>49</sup> It featured rappers backed by studio musicians recreating the distinctive instrumental portion of "Good Times," a contemporaneous hit song by the group Chic.<sup>50</sup> (This sub-category of songs—consisting of a rap vocal backed by a recognizable, previously copyrighted tune—will be referred to as "hybrids.") Soon after the release of "Rapper's Delight," the composers of "Good Times," Nile Rodgers and Bernard Edwards, threatened to sue Sugarhill for infringing upon their copyrighted composition.<sup>51</sup> The parties

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1997 edition of *Goldmine Magazine*). They were separately sued by record labels for "unfair competition," on the ground that their recordings used the services of performers who were under exclusive contract to the record labels. See *Modern Joins in Luniverse Suit; Quick Action Skedded*, BILLBOARD, Nov. 17, 1956, at 16, 30. At the time (prior to 1972), the record labels had no intellectual property rights in the sound recordings.

<sup>46</sup> JOEL WHITBURN, *THE BILLBOARD BOOK OF TOP 40 HITS* 260 (8th ed. 2004).

<sup>47</sup> JOSEPH SCHLOSS, *MAKING BEATS: THE ART OF SAMPLE-BASED HIP-HOP* 19–20 (2004).

<sup>48</sup> See *Lawrence v. Dana*, 15 F. Cas. 26, 40 (C.C.D. Mass. 1869). Fair use is now codified at 17 U.S.C. § 107.

<sup>49</sup> See Steven Daly, *Hip Hop Happens*, VANITY FAIR, Nov. 2005, at 250.

<sup>50</sup> *Id.* Sugarhill's house band had reproduced Chic's "Good Times" on the record, yet initial pressings only credited producer Sylvia Robinson and the Sugarhill Gang with authorship. *Id.*

<sup>51</sup> *Id.*

reached an out-of-court settlement,<sup>52</sup> and Rodgers and Edwards are now included as co-writers of "Rapper's Delight"<sup>53</sup> (and, presumably, receive a share of the considerable profits from the song). The story of "Rapper's Delight" shows that copyright holders successfully asserted a right to control sampling from the very dawn of recorded hip-hop. The settlement was consistent with established practices in the music business, and it did not inhibit the birth of recorded hip-hop or its subsequent development.

In 1980, shortly after "Rapper's Delight," Sugarhill Records released the first commercial recording of turntablism, "The Adventures of Grandmaster Flash on the Wheels of Steel."<sup>54</sup> The song featured the celebrated DJ, Grandmaster Flash, manipulating a number of easily recognizable recent hit records (including, once again, "Good Times"). Like the Buchanan and Goodman records, "The Adventures of Grandmaster Flash" likely implicated the copyrights of multiple composers. "The Adventures of Grandmaster Flash" further involved the relatively new copyrights in sound recordings. The existence of copyright law, and recent experience with litigious composers, however, did not prevent the release of the record.

### 3. *Evidence of Business Practice: The Misunderstood Case of Grand Upright*

Obtaining sample clearance appears to have long been standard practice in the recording industry. Legal commentators' reaction to *Grand Upright Music v. Warner Bros. Records*,<sup>55</sup> a 1991 federal district court case, is emblematic of their tendency to overstate copyright's inhibiting influence on recoding. *Grand Upright* enjoined the sale of a hip-hop album that used an unauthorized sample from a pop single.<sup>56</sup> Intellectual property commentators assert, without foundation, that the case gave copyright owners new rights against samplers and thus suddenly imposed new, burdensome licensing costs on recoding.<sup>57</sup> This is manifestly incorrect. The preceding discussion shows that samplers paid for copyright permission from the beginning of recorded hip-hop.<sup>58</sup> By the

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See THE ANTHOLOGY OF RAP, *supra* note 27, at 10.

<sup>55</sup> 780 F. Supp. 182 (S.D.N.Y. 1991).

<sup>56</sup> *Id.* at 185.

<sup>57</sup> See, e.g., KEMBREW MCLEOD, FREEDOM OF EXPRESSION 67–68 (2005) (asserting that digital sampling in the late 1980s "was a sort of Wild West" of "free experimentation" that suddenly ended due to *Grand Upright*); VAIDHYANATHAN, *supra* note 10, at 140–41 (claiming that before *Grand Upright*, "no one knew what the guidelines for digital sampling were," and "the industry was waiting for a court to weigh in").

<sup>58</sup> Similarly, a widely-cited student note recently argued that copyright law endangers jazz music today because it requires musicians to pay for permission to record jazz versions of existing

time of *Grand Upright*, sample clearance was a firmly established artistic and business norm: indeed, closer inspection of *Grand Upright* itself verifies this.

Double Dee and Steinski's 1983 song, "Lesson 1-The Payoff Mix," was made by splicing together analog tapes of scores of copyrighted sources.<sup>59</sup> It has become an important influence on hip-hop production, but according to Steinski, it was never released commercially due to concerns about the cost of clearances.<sup>60</sup> This indicates an understanding among the earliest hip-hop samplers that they were obliged to pay for copyright permission. Although legal concerns prevented commercial release of that particular work, "Lesson 1" was nonetheless made and, moreover, achieved cultural importance. "Lesson 1" became highly influential on later hip-hop and paved the way for Steinski to become a successful hip-hop producer and recording artist.<sup>61</sup>

MC Hammer, who used the tune from Rick James's "Super Freak" in his immense 1990 hit "U Can't Touch This," acknowledged an obligation to pay James for copyright permission: "I didn't need a lawyer to tell me that . . . I'm borrowing enough of his song that he deserves to be compensated."<sup>62</sup> The 1991 rap single "Pop Goes the Weasel," by 3rd Bass, reflects a similar view of copyright: the song uses samples itself, but the lyrics mock a rapper who fails to give credit for samples and gets sued.<sup>63</sup> This is an apparent reference to Vanilla Ice,<sup>64</sup> who was accused of using an unauthorized sample of the Queen and David Bowie song "Under Pressure" in his 1990 hit, "Ice Ice Baby." Notably, Vanilla Ice did not assert the argument, fashionable today, that he should be legally entitled to sample without permission. Rather, he insisted that the passage in his song was slightly different from "Under Pressure"—for which he was widely ridiculed.<sup>65</sup> By 1991, he had entered into a settlement that reportedly cost

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compositions. See Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1944 (2005). Copyright law, however, has imposed this cost since the earliest days of jazz.

<sup>59</sup> See WNYC Soundcheck, *Steinski Gives a Sampling History Lesson*, NPR MUSIC (Oct. 22, 2008), <http://www.npr.org/templates/story/story.php?storyId=93844583>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 726 (1992) [hereinafter *New Spin*] (quoting Peter Castro, *Chatter*, PEOPLE WKLY., July 30, 1990, at 86).

<sup>63</sup> 3RD BASS, *Pop Goes the Weasel*, on DERELICTS OF DIALECT (Def Jam/Columbia 1991). The lyrics are available at 3rd Bass—*Pop Goes the Weasel Lyrics*, SONGLYRICS, <http://www.songlyrics.com/3rd-bass/pop-goes-the-weasel-lyrics/> (last visited Sept. 26, 2011).

<sup>64</sup> The music video accompanying "Pop Goes the Weasel" portrays the members of 3rd Bass beating up an actor dressed as Vanilla Ice. 3rd Bass—*Pop Goes The Weasel (High Quality)*, YOUTUBE, <http://www.youtube.com/watch?v=kqGXM23WUbs> (last visited Sept. 26, 2011).

<sup>65</sup> Michael J. Mooney, *For Us, Rob Van Winkle Will Always be Vanilla Ice*, MIAMI NEW TIMES, Nov. 26, 2009 ("He defended his beat in an infamous video clip—'Theirs goes ding-ding-ding dada ding-ding, and mine goes ding-ding-ding dada ding-ding dink . . .'").



him four million dollars.<sup>66</sup>

According to a student author who interviewed music lawyers and record company executives shortly before the *Grand Upright* decision:

Prudent music lawyers advise their artists to keep track of samples included in their music and then seek out the copyright holders to bargain for the right to use the sample. After determining the cost of a prospective license, a record executive or producer weighs that cost against the potential success of the new work embodying the sample.<sup>67</sup>

There is considerable support for this view, including the facts of the widely misunderstood *Grand Upright* case itself. Extensive and uncontroverted testimony in the case indicates that before the case was decided, it was established and understood practice for hip-hop artists to request and pay for copyright permission for samples.

*Grand Upright* involved the song “Alone Again,” by the rapper Biz Markie. The instrumental element of the song is constructed from a sample from “Alone Again (Naturally),” a 1972 pop record written and performed by Raymond “Gilbert” O’Sullivan. O’Sullivan was the principal shareholder of the plaintiff corporation, Grand Upright Music, Limited, which claimed ownership of copyrights in the sound recording and the composition. The opening eight bars of the O’Sullivan recording, or “about 30 seconds,” are sampled and looped (i.e., repeated) to form the instrumental basis for the entire length of the song.<sup>68</sup> In addition, Biz Markie sings a version of the title phrase.<sup>69</sup> The song appeared on Biz Markie’s album *I Need a Haircut*, produced by an independent record label, Cold Chillin’, released by Warner Brothers Records, and distributed by Warner’s subsidiary, WEA.<sup>70</sup> Markie, Cold Chillin’, Warner, and WEA

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<sup>66</sup> *Id.*

<sup>67</sup> *New Spin*, *supra* note 62, at 727–28 (footnotes omitted). *But see* BOYLE, *supra* note 14, at 148 (asserting that seeking sample clearance was rare prior to *Grand Upright*).

<sup>68</sup> See Transcript of Nov. 25, 1991 Hearing at 13, *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (No. 91 Civ. 7648 (KTD)) [hereinafter Nov. 25 Hearing] (testimony of Raymond “Gilbert” O’Sullivan). The court records in *Grand Upright* are stored at the National Archives Records Center, Lee’s Summit, Missouri, Accession/transfer no. 021-93-0007, Box no. 182, Location no. B4207072. A copy is on file with the author.

<sup>69</sup> The song can be heard online in various places, including the UCLA and Columbia Law School Copyright Infringement Project website, <http://cip.law.ucla.edu/cases/1990-1999/Pages/granduprightwarner.aspx> (last visited Oct. 6, 2011).

<sup>70</sup> See Deposition of Leonard Fichtelberg at 4–7, *Grand Upright*, 780 F. Supp. 182 (No. 91 Civ. 7648) [hereinafter Fichtelberg Deposition] (explaining the relationship between Cold Chillin’ and Warner Brothers); Deposition of George Rossi at 4–5, *Grand Upright*, 780 F. Supp. 182 (No. 91 Civ. 7648) (explaining WEA’s relationship to Warner Brothers).

were all named defendants.

The *Grand Upright* court stated that the defendants “admit” to unlicensed use of the sound recording and the composition.<sup>71</sup> The court reasoned that the only remaining issue was whether Grand Upright owned the copyrights.<sup>72</sup> Based on this cursory discussion of infringement, the opinion is widely misinterpreted as holding, without explanation, that unauthorized sampling categorically constitutes copyright infringement.<sup>73</sup> In fact, the court made no such holding, conclusory or otherwise. Commentators have uniformly overlooked the fact (not readily apparent from the opinion alone) that the case did not even present the legal question of whether Biz Markie’s sample, or sampling generally, constituted infringement.

The record of the case shows that the defendants did not merely “admit” to having sampled without permission; they conceded that unauthorized sampling is *illegal*.<sup>74</sup> The defendants—a rapper, an independent hip-hop label, and a multinational major label—unequivocally agreed that the sample at issue required copyright clearance, and that they had used the sample in question without permission. The lawyer representing all of the defendants<sup>75</sup> stated in court: “We acknowledge that we do not have the right to [use the sample without clearance;] we acknowledge that at some point we are going to have to pay the copyright proprietor.”<sup>76</sup> The *Grand Upright* court did not “hold” that the unauthorized sample (or any unauthorized sample) was infringing; that was accepted by all parties for purposes of the case. In any event, the opinion merely granted a preliminary injunction,<sup>77</sup> and thus did not purport to be a final disposition on the merits of *any* issue.<sup>78</sup>

The defense’s primary argument had been that Grand Upright had failed to prove it was the copyright owner of either O’Sullivan’s

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<sup>71</sup> *Grand Upright*, 780 F. Supp. at 183.

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 650 n.14 (6th Cir. 2004) (order granting panel rehearing) (criticizing the *Grand Upright* opinion for failing to show adequate analysis); BOYLE, *supra* note 18, at 148 (condemning the *Grand Upright* opinion as “poor,” “overly broad,” and “judicially inappropriate”); MCLEOD, *supra* note 48, at 78–79 (criticizing the *Grand Upright* judge); Arewa, *supra* note 10, at 580 (“The court did not analyze why the sample was infringement under applicable copyright law standards.”).

<sup>74</sup> See Transcript of Nov. 26, 1991 Hearing at 148, *Grand Upright*, 780 F. Supp. 182 (No. 91 Civ. 7648) [hereinafter Nov. 26 Hearing].

<sup>75</sup> See *Grand Upright*, 780 F. Supp. at 183 (identifying Robert W. Cinque, of Cinque & Cinque, P.C., as counsel for defendants).

<sup>76</sup> Nov. 26 Hearing, *supra* note 74, at 148.

<sup>77</sup> *Grand Upright*, 780 F. Supp. at 183, 185.

<sup>78</sup> Shortly after the reported opinion granted the preliminary injunction, the parties (presumably having reached a settlement) agreed to dismiss the case with prejudice. Stipulation and Order of Dismissal [sic] with Prejudice, *Grand Upright*, 780 F. Supp. 182 (No. 91 Civ. 7648).

composition or the sound recording of it.<sup>79</sup> The defendants' other line of argument was that even if Grand Upright owned the copyrights, the defendants' release of the album prior to obtaining clearance constituted good faith conduct and thus an injunction would be an excessive remedy. They claimed that they were in discussions with Grand Upright at the time of release, and that it was common industry practice to release music during clearance negotiations and finalize terms later.<sup>80</sup> The president of Cold Chillin' Records, as well as a copyright administrator and a music-publishing executive with no involvement in the dispute, testified to this practice.<sup>81</sup> The administrator further stated she had never refused a request for clearance.<sup>82</sup> Notably, neither of the defendants' two arguments asserted a right to sample without permission; indeed, the latter theory acknowledged an infringement, and claimed only that it was a minor and non-willful violation.

Despite the evidence that the industry generally tolerated releases during negotiations, other evidence suggested that at the time the album was released, the defendants knew that Grand Upright would not grant permission.<sup>83</sup> Thus the judge dismissed the "good faith" argument in a

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<sup>79</sup> See Defendants' Post-Hearing Memorandum on Plaintiff's Application for Preliminary Injunction at 3–13, *Grand Upright*, 780 F. Supp. 182 (No. 91 Civ. 7648) [hereinafter Post-Hearing Memorandum] (arguing that Grand Upright had not proven ownership of the copyright to the composition "Alone Again (Naturally)"); *id.* at 14–15 (arguing the same with respect to ownership of the copyright to the sound recording). Although the Sixth Circuit has criticized *Grand Upright* for failing to distinguish between the composition copyright and the sound recording copyright, see *Bridgeport Music, Inc. v. Dimension Films*, 401 F.3d 647, 650 n.14 (6th Cir. 2004), this is another unfounded criticism. *Grand Upright* clearly states that it involves *both* the copyright to the "song" and "the master recording thereof." 780 F. Supp. at 183. In any event, the distinction was unimportant because the case involved a preliminary injunction application by the owner of both copyrights.

<sup>80</sup> See Nov. 26 Hearing, *supra* note 74, at 76–77 (reflecting defense counsel's argument that the fact that defendants entered into negotiations prior to the time of release goes to the issue of good faith). Late in the proceedings, the defendants also asserted that their use of the sample was "*de minimis*." Post-Hearing Memorandum, *supra* note 79, at 20. This was *not*, however, an assertion of a "*de minimis* defense" to infringement. (That doctrine is discussed *infra* Section II.B.2.) Defendants' argument was merely that an injunction requiring recall of the album would be disproportionate to the small scale of the offense. Post-Hearing Memorandum, *supra* note 79, at 20. Indeed, by this point in the proceedings, the defendants conceded that it *would* be appropriate to impose money damages. *Id.*

<sup>81</sup> See Fichtelberg Deposition, *supra* note 70, at 33, 38–39, 41 ("Generally, we try to work them out before the release, and in a lot of cases they get worked out after the release."); Nov. 26 Hearing, *supra* note 74, at 126, 134 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing) (establishing general industry custom and practice with regard to sampling).

<sup>82</sup> Nov. 26 Hearing, *supra* note 74, at 135 (testimony of Jane Peterer). The music-publishing executive testified that he had refused permission "on a few occasions, generally when we feel a song is either so obscene or . . . politically incorrect that we don't want our song to be associated with them [sic]." *Id.* at 129 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing).

<sup>83</sup> See Nov. 26 Hearing, *supra* note 74, at 19–23 (testimony of Raymond "Gilbert" O'Sullivan) (describing his protectiveness of "Alone Again (Naturally)" and his distaste for Biz Markie's song); *id.* at 17–18 (stating that there was "[n]o way" Grand Upright had ever granted anyone in the United States permission to use portions of O'Sullivan's master recording of "Alone Again (Naturally)").

hearing, stating, "if a guy starts negotiations and they are not fruitful and he goes ahead and does it anyway, then that might be taken to be some evidence of wilfulness [sic]."<sup>84</sup> In this context, it is clear why the opinion stated that the "only issue" in the case was whether Grand Upright owned the copyrights.<sup>85</sup> Since the defendants had conceded using the sample without permission, and the judge had rejected their justification for doing so, ownership was indeed the sole remaining issue. Satisfied that Grand Upright had proven ownership,<sup>86</sup> the court granted a preliminary injunction against further sale of the album.<sup>87</sup>

Leading commentators have unfairly criticized the *Grand Upright* opinion for failing to consider a fair use defense.<sup>88</sup> But since the defendants conceded that unauthorized sampling constitutes infringement, they never raised, even implicitly, the fair use defense. It would have been unnecessary, if not improper, for the court to consider such a defense on its own motion. Furthermore, the opinion merely addressed an application for a preliminary injunction; the defense could have been raised and considered later had the case progressed to trial.

The defendants' concessions with respect to sample clearance requirements appear to reflect industry practice of the time. A vice president of EMI Music Publishing, testifying as an expert on sample clearance, stated that he was the *de facto* head of sample clearance for EMI (a major record label).<sup>89</sup> In less than three years with the company, he had been involved in "approximately 100, 120" instances in which EMI's material was sampled and "settled about 15 or 20" cases in which EMI artists had been accused of sampling without permission.<sup>90</sup>

Biz Markie, Cold Chillin' and Warner Brothers all appreciated the risk of copyright liability in releasing a sample-heavy record, and allocated that risk by contract. With respect to any copyright infringement, Cold Chillin' was obligated to indemnify Warner Brothers and the artist was obligated to indemnify Cold Chillin'.<sup>91</sup> Biz Markie, in deposition testimony, stated that

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<sup>84</sup> Nov. 26 Hearing, *supra* note 74, at 77.

<sup>85</sup> *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182, 183 (S.D.N.Y. 1991).

<sup>86</sup> *Id.* at 183–84.

<sup>87</sup> *Id.* at 185.

<sup>88</sup> See, e.g., Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 300 n.313 (1998); Mark Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 896 n.126 (1997) (reviewing JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1997)).

<sup>89</sup> Nov. 26 Hearing, *supra* note 74, at 120, 124–25 (testimony of Fredrick Silber, Vice President of Business Affairs, EMI Music Publishing).

<sup>90</sup> *Id.* at 124–25.

<sup>91</sup> See Fichtelberg Deposition, *supra* note 70, at 34. Biz Markie's lawyers suggested that Cold Chillin' had a cavalier attitude about sample clearance because of this indemnification arrangement. See *Grand Upright*, 780 F. Supp. at 185 (quoting August 16 letter to Cold Chillin').

he had an obligation—which he fulfilled—to give completed tapes of his work to his lawyer, whose “job” was to then obtain clearances for the samples used in the tapes.<sup>92</sup>

Biz Markie’s lawyers assumed from the outset that copyright permission would be required. After the album was recorded, but before it was released, the lawyers sent a tape of “Alone Again” to Grand Upright’s representative and requested permission to release the song as part of the album.<sup>93</sup> Before permission was obtained, however, Cold Chillin’ Records delivered the master recording of *I Need a Haircut* to Warner Brothers and Warner Brothers released it.<sup>94</sup> The premature release does not mean Cold Chillin’ thought sample clearance was unnecessary; it had scrupulously observed clearance requirements with respect to other samples on the same album. For example, when Biz Markie’s lawyer had difficulty obtaining permission to use a sample in another song, Cold Chillin’s president had tried to help.<sup>95</sup> When the request was denied, Cold Chillin’ dropped the offending song from the album, even though this required creating a costly new master recording of the entire album.<sup>96</sup>

The court’s opinion has been criticized—ridiculed, even—for opening with the Biblical proscription “Thou shalt not steal.”<sup>97</sup> One commentator has argued that this evidences “a disdainful, if not contemptuous, view by judges for the type of musical borrowing involved in hip hop as a genre.”<sup>98</sup> But these commentators take the sentence out of context. The sentence is not about sampling generally; it is about an admittedly unauthorized instance of sampling in a case where the defendants themselves conceded

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<sup>92</sup> Deposition of Marcel Hall (a/k/a Biz Markie) at 48, 51, *Grand Upright*, 780 F. Supp. 182 (No. 91 Civ. 7648) [hereinafter Biz Markie Deposition] (“I just knew when I was done with my album, I make tapes and I give it [sic] to my lawyer and he clears them. That’s all I know.”).

<sup>93</sup> *Grand Upright*, 780 F. Supp. at 184; see *New Spin*, *supra* note 62, at 744 (citing, in the Editor’s Note, a December 18, 1991 telephone interview with Robert Cinque, lawyer for the *Grand Upright* defendants).

<sup>94</sup> See Fichtelberg Deposition, *supra* note 70, at 35–37, 42 (“[W]e could have held the album if the records weren’t pressed, but they were pressed and then, you know, I just had to release it, you know.”).

<sup>95</sup> See *id.* at 29–31 (explaining that Leonard Fichtelberg, the President of Cold Chillin’ Records had called the manager of the Eagles, the rock group Biz Markie had sampled from, to see whether he could get the Eagles to clear the sample).

<sup>96</sup> *Id.*

<sup>97</sup> *Grand Upright*, 780 F. Supp. at 183 (quoting *Exodus* 20:15). The many critics who have singled out this passage include Arewa, *supra* note 10, at 580 (suggesting the court’s use of the quote in the decision demonstrated its negative view of hip hop); K.J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 HASTINGS COMM. & ENT. L.J. 339, 382 n.202 (1999) (stating that the judge who wrote the opinion cited no other authority than the bible quote); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 579 n.15 (2005) (arguing that the court’s use of the quote in the decision oversimplified statutory provisions for sound recordings); Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 410 (2003) (asserting that copyright laws are more complex than the biblical quote would suggest).

<sup>98</sup> Arewa, *supra* note 10, at 581.

that copyright permission was required. Indeed, Biz Markie himself seemed to agree with the judge's characterization of knowing and deliberate infringement as theft. When asked in his deposition if he understood the meaning of copyright infringement, he replied, "[t]hat means something that was copyrighted already and I stole it."<sup>99</sup> Nothing in his deposition suggests he believed he had (or deserved) a right to sample without permission; as noted above, he understood and accepted the clearance requirement and argued only that the failure to get clearance was his lawyer's fault.

*Grand Upright*, then, did not announce a change in legal doctrine; nor did it require any change in business or artistic practice in the recording industry. By the time of *Grand Upright*, the industry appears to have already reached a consensus interpretation of samplers' obligations under the Copyright Act, and appears to have been successfully implementing that interpretation. While it is possible that the judicial stamp of approval may have added legitimacy to the practice of sample clearance, the practice needed no such affirmation. For all practical purposes, this practice was already the "law," despite the lack of specific pronouncements on sampling by courts or Congress. This "law" did not prevent the artistic or commercial development of sampling; indeed, it coexisted with some of the most artistically and commercially successful examples of sample-based hip-hop.

## B. "Slice-and-Dice:" More Samples, More Problems?

### 1. Clearance Requirements and Multiple Samples

Biz Markie's 1991 "Alone Again" was a rap-plus-pop-tune hybrid along the lines of 1979's "Rapper's Delight." Since the early days of hip-hop, however, many artists and producers had used sampling in more ambitious and transformative ways.<sup>100</sup> By the late 1980s, digital technology enabled producers to take the mix-and-match aesthetic of turntablism to new extremes. Thus many artistically and commercially important albums of the late 1980s and early 1990s used brief samples, transformed by digital processing and combined in large numbers to create dense, layered pieces very different from their musical sources. For convenience, this Article will (inelegantly and imprecisely) refer to more complex combinations of samples as the "slice-and-dice" approach.<sup>101</sup> The number of samples used increased the number of copyrights involved and, presumably, the complexity of obtaining permission. Many commentators argue that the requirement of obtaining sample clearances for samples

<sup>99</sup> Biz Markie Deposition, *supra* note 92, at 6–7.

<sup>100</sup> See *supra* notes 47–49 & 54 (discussing the work of Steinski and Grandmaster Flash).

<sup>101</sup> James Boyle uses the term "wall of sound" to refer to this style. BOYLE, *supra* note 18, at 148.

(supposedly created by *Grand Upright*) made the cost of producing slice-and-dice music prohibitive.<sup>102</sup>

Although this argument may sound plausible in theory, it is an ahistorical one. Complex combinations of multiple sources were common in early hip-hop DJing and, as noted above, had already been commercially recorded by Grandmaster Flash by 1981. Furthermore, as argued above, sample clearance was already an established practice, and slice-and-dice practitioners appear to have observed it just as other hip-hop artists did.

For example, in 1989 (two years before *Grand Upright*), the Beastie Boys and their producers, the Dust Brothers, released the critically praised, sample-heavy album *Paul's Boutique*. They sought and obtained clearances for the many samples used in the album—at a cost said to have been between \$200,000 and \$250,000.<sup>103</sup> The year 1989 saw another landmark example of hip-hop sampling: De La Soul's commercially and critically successful album, *3 Feet High and Rising*. Like *Grand Upright*, it also spawned a copyright dispute that is incorrectly blamed for helping to establish a clearance requirement for sampling.<sup>104</sup>

In fact, like *Paul's Boutique*, the *3 Feet High and Rising* story actually shows that the clearance practices outlined in the *Grand Upright* testimony were an accepted part of slice-and-dice production by 1989. One song on *3 Feet High and Rising* used an unauthorized sample from "You Showed Me," a 1969 record by the Turtles. When members of the Turtles threatened to sue Tommy Boy Records for releasing the album<sup>105</sup> the label agreed to a settlement.<sup>106</sup> De La Soul and Prince Paul, the album's producer, never asserted a right to sample without permission. Indeed, they believed copyright clearance to be legally and ethically required. Band member Mase believes the Turtles "rightfully" sued, stating: "That's fine. That was cool."<sup>107</sup> As in *Grand Upright*, copyright responsibility appears to have been understood and allocated by contract. The group and its producer maintain that Tommy Boy was contractually obligated to

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<sup>102</sup> See *id.*; CHRISTOPHER R. WEINGARTEN, IT TAKES A NATION OF MILLIONS TO HOLD US BACK 40–41 (2010).

<sup>103</sup> BRIAN COLEMAN, CHECK THE TECHNIQUE: LINER NOTES FOR THE HIP-HOP JUNKIES 17 (2007).

<sup>104</sup> See VAIDHYANATHAN, *supra* note 10, at 141.

<sup>105</sup> The threatened suit was apparently based on sound recording rights, as the Turtles did not write the song: it was composed by Roger McGuinn (a/k/a Jim McGuinn) and Gene Clark of the folk-rock group The Byrds. See THE BYRDS, PREFLYTE (Together Records 1969).

<sup>106</sup> Robert Hilburn, *Alive and Rapping*, L.A. TIMES, June 30, 1991, at 6.

<sup>107</sup> *Fresh Air: Dave and Mase from De La Soul Discuss Their Music* NPR (Sept. 1, 2005); see also Patrick O'Neil, *The Madminute with Posnudos* [sic], MX, May 13, 2003, at 4 (quoting Posnudos, a member of De La Soul, as saying, "They have the right to have their music protected and we want our samples protected"); Angus Batey, *Last Chance to Comprehend*, HIPHOP.COM (Apr. 7, 2009), <http://www.hiphop.com/features/60-de-la-soul-3-feet-feature-part-two> (quoting Dave, another band member).

obtain clearances for the album (a claim that Tommy Boy has apparently not disputed).<sup>108</sup>

Despite the established practice of seeking clearances, Tommy Boy apparently chose to take the risk of being sued in the future instead of bearing the upfront cost of licensing. Although commentators have decried the idea that the Turtles should have been paid for a “sliver” of a song,<sup>109</sup> that criticism fails to consider the fact that the “sliver”—no less than the services of a backup musician, composer, or engineer—was one of the economic inputs that made up an immensely successful commercial product. In 1989, *3 Feet High and Rising* reached number one on the Billboard R&B album chart and number twenty-four on the Billboard Hot 200 chart.<sup>110</sup> According to Prince Paul, “even after the law suit [against Tommy Boy] I got a nice royalty cheque [from Tommy Boy].”<sup>111</sup>

Members of the legendary hip-hop group Public Enemy have expressed less enthusiasm about the practice of obtaining clearances, but they appear nonetheless to have been complying with industry practice even before *Grand Upright*. This did not prevent them from pioneering slice-and-dice digital sampling in the late 1980s and early 1990s. Hank Shocklee, the producer of Public Enemy’s classic albums, stated that “by the late 1980s” copyright holders were granting permission to use samples “for around \$1500,” and prices rose dramatically thereafter.<sup>112</sup> The existence of known prices obviously suggests that paying for permission was a common practice. Shocklee’s complaint about high prices seems to suggest that Public Enemy was in the habit of paying for permission, despite claiming otherwise in other interviews<sup>113</sup> and in a rap song.<sup>114</sup> Public Enemy’s professed anti-licensing stance must also be considered in

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<sup>108</sup> See *Fresh Air*, *supra* note 107 (“[W]e turned in all sample information [to Tommy Boy] and what we sampled and what we needed cleared. And unfortunately, the record label just didn’t take its time . . .”); see also Batey, *supra* note 107 (“We went through the process of making sure we had all the information. Unfortunately . . . Tommy Boy didn’t take the opportunity to clear *all* the samples prior to the record’s release . . .”).

<sup>109</sup> See VAIDHYANATHAN, *supra* note 10, at 141.

<sup>110</sup> *3 Feet High and Rising: Charts and Awards*, ALLMUSIC.COM, <http://www.allmusic.com/album/3-feet-high-and-rising-r27752/charts-awards>.

<sup>111</sup> Batey, *supra* note 107.

<sup>112</sup> WEINGARTEN, *supra* note 102, at 41.

<sup>113</sup> Despite his complaint about clearance costs quoted in the text, Shocklee has elsewhere claimed he “never really cleared the samples” on the group’s earlier albums. MCLEOD, *supra* note 57, at 78. But in the same interview, he seemed to contradict himself by saying the higher cost of clearances started “catching up to us” by 1990. *Id.*

<sup>114</sup> In a 1988 Public Enemy song, vocalist Chuck D rapped that “the courts” have accused Public Enemy of stealing because of its sampling, for which he “paid zero.” See VAIDHYANATHAN, *supra* note 10, at 144–45 (quoting PUBLIC ENEMY, *Caught—Can We Get a Witness?*, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK (DefJam/Columbia Records 1988)). But this appears to be poetic license. There does not appear to have been a court disposition, or even a lawsuit filed, with respect to any Public Enemy sample.



light of the fact that Chuck D, Public Enemy's leader and lead vocalist, brought two infringement suits (one against a fellow rapper) alleging unauthorized sampling of his voice.<sup>115</sup>

*Grand Upright* did not spell the end of sampling generally or slice-and-dice specifically, despite some commentators' unfounded insistence that hip-hop went into decline in response to the opinion.<sup>116</sup> Even Biz Markie continued to use samples on his next album, prudently entitled *All Samples Cleared!* Many knowledgeable observers of hip-hop music believe it reached an artistic peak in the early to mid-1990s—that is, a few years *after* the *Grand Upright* opinion. For example, one recent scholarly study opines that “for sheer volume of classic hip-hop it is difficult to surpass 1993–94.”<sup>117</sup>

Even assuming prices were rising, sampling remained a common method of hip-hop production through the 1990s and remains so today. During the 1990s, sampling techniques continued to develop. Slice-and-dice never entirely went away, although it underwent some permutations. Indeed, in 1996, Beck's hip-hop influenced album, *Odelay*, introduced slice-and-dice to a broad mainstream audience.<sup>118</sup> The album was produced by the Dust Brothers, who also produced *Paul's Boutique*, and the album has a similar sound made up of dense, layered samples. Many slice-and-dice artists began to use samples that were of obscure origin and cut and processed them even more radically. A hip-hop artist, DJ Shadow, is credited with inspiring this trend, sometimes described as a subgenre called “trip-hop.”<sup>119</sup>

If clearance fees indeed increased at the end of the 1980s, it was likely due to changed market conditions: artistic fashion, popular taste, and technological advances had combined to increase the value of copyrighted recordings and compositions. If, indeed, copyright holders charged higher rates for copyright clearance, that was presumably possible only because sample-based music was generating greater revenues. The argument that copyright holders raised clearance prices so high as to prevent the use of samples defies economic logic. Indeed, the emergence of sample clearance as a revenue stream may have made it *easier* to obtain sample clearance by

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<sup>115</sup> See Randy Reiss, *Public Enemy's Chuck D Settles B.I.G. Copyright Suit*, VH1 (Nov. 17, 1998, 10:22 PM), [http://www.vh1.com/news/articles/504067/11171998/chuck\\_d.jhtml](http://www.vh1.com/news/articles/504067/11171998/chuck_d.jhtml).

<sup>116</sup> See BOYLE *supra*, note 18, at 148 (claiming that the “wall of sound” approach gave way to “simplistic thumping beat” and the “unimaginative synthesizer lines of modern rap”); VAIDHYANATHAN, *supra* note 10, at 143–44 (opining that the Biz Markie case “stole the soul” of hip-hop).

<sup>117</sup> THE ANTHOLOGY OF RAP, *supra* note 31, at 330.

<sup>118</sup> The album won two Grammy awards. See *Past Winners Search*, GRAMMY.COM, <http://www.grammy.com/nominees/search?artist=Beck&title=&year=All&genre=All>.

<sup>119</sup> DJ Shadow Biography, WORLD OF TRIP-HOP, <http://triphop-music.com/band/dj-shadow> (last visited Sept. 19, 2011).

giving record companies incentive to process—and grant—clearance requests instead of simply ignoring them. Many record companies, including Universal Music and BMG Music, now provide easily accessible online forms for would-be samplers to request copyright clearance.<sup>120</sup>

## 2. Bridgeport v. Dimension Films: *Another Misunderstood Decision*

Ironically, while pioneering slice-and-dice groups like Public Enemy, the Beastie Boys, and De La Soul seem to have assumed they were obligated to pay clearances for their samples, unauthorized slice-and-dice might have been legally defensible. Chuck D of Public Enemy seems to have believed in the late 1980s that he was obligated to obtain clearances even for “unrecognizable” samples.<sup>121</sup> But many of the brief, unrecognizable samples in “slice-and-dice” productions arguably did not require copyright permission. In doctrinal terms, they arguably involved only *de minimis* copying and lacked “substantial similarity” to their source material.<sup>122</sup> Indeed, several later cases have applied this doctrine to find that brief samples did not infringe upon copyrights in the underlying composition.<sup>123</sup> Most notably, in the 2002 case *Newton v. Diamond*,<sup>124</sup> a federal district court used this reasoning to hold that a three-note sample in a Beastie Boys record was non-infringing.<sup>125</sup>

Slice-and-dice samples may also fall under the “fair use” exception to copyright infringement for similar reasons. One of the factors supporting a fair use exception is “the amount and substantiality of the portion used in

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<sup>120</sup> See RICHARD STIM, GETTING PERMISSION: HOW TO LICENSE & CLEAR COPYRIGHTED MATERIALS ONLINE AND OFF 161–63 (3d ed. 2007) (listing music clearance companies).

<sup>121</sup> MCLEOD, *supra* note 57, at 68.

<sup>122</sup> See *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765 (2d Cir. 1991) (“[A] plaintiff must first show his work was copied by proving access and substantial similarity between the works . . .”). For a contemporaneous case suggesting the *de minimis* exception, see *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267–68 (5th Cir. 1988) (holding that the use of thirty characters out of fifty pages of computer source code was *de minimis*). The *de minimis* exception was made clearer in subsequent cases, most notably *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 77 (2d Cir. 1997) (finding the use of a copyrighted poster as set decoration on a television show was not *de minimis* where it was partially visible for about twenty-five seconds and almost entirely visible for about five seconds) and *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 218 (2d Cir. 1998) (finding fleeting, unrecognizable glimpses of copyrighted photos in a movie were *de minimis* and thus noninfringing).

<sup>123</sup> See *Staggs v. West*, Civ. No. PJM 08-728, 2009 WL 2579665, at \*3 (D. Md. Aug. 17, 2009) (dismissing a claim that a sample in a hip-hop song violated the copyright in a composition because “an ordinary listener—the Court in this case—would quickly determine that the melodies of the songs are not similar”); *Jean v. Bug Music, Inc.*, No. 00 Civ. 4022(DC), 2002 WL 287786, at \*1 (S.D.N.Y. Feb. 27, 2002) (holding that a sample was *de minimis* and did not infringe the copyright in the composition because “[o]nly three words and notes in the [two songs] are identical. Overall the songs are different in sound and they convey different moods”).

<sup>124</sup> 204 F. Supp. 2d 1244 (C.D. Cal. 2002).

<sup>125</sup> *Id.* at 1259.

relation to the copyrighted work as a whole . . . .”<sup>126</sup> Furthermore, as the Supreme Court held in *Campbell v. Acuff-Rose Music, Inc.*,<sup>127</sup> a use that “adds something new, with a further purpose or different character, altering the [source] with new expression, meaning, or message” has a “transformative” character that weighs in favor of a fair use determination.<sup>128</sup> Neither this “transformation” argument nor the *de minimis* defense seems applicable to the song at issue in *Grand Upright*, which used a significant and recognizable portion of its source material.<sup>129</sup> It was, then, unclear after *Grand Upright* whether copyright doctrine required clearance for slice-and-dice sampling.

The status of slice-and-dice remains unclear even today, decades after it first appeared in hip-hop. *Bridgeport Music, Inc. v. Dimension Films*,<sup>130</sup> the circuit decision most closely on point, was not decided until 2005. In that case, the Sixth Circuit rejected the *de minimis* defense with respect to a sample used in “100 Miles and Runnin’” (“100 Miles”), a song by the rap group NWA. The song contained a brief sample of a keening, siren-like electric guitar passage from a record by the group Funkadelic.<sup>131</sup> Although some commentators argue that *Bridgeport* placed a burden on innovative music,<sup>132</sup> “100 Miles” was eleven years old by the time the lawsuit was filed, and fifteen years old by the time the court handed down its decision.<sup>133</sup> “100 Miles” was recorded in 1990, and reflected the slice-and-dice style of that era. One commentator noted that the same Funkadelic song had previously been sampled by Public Enemy, and that “100 Miles” imitated the production style Hank Shocklee used on Public Enemy records in the late 1980s.<sup>134</sup> The lawsuit in *Bridgeport* was not against NWA or its record company, but against No Limit Films, a company that used “100 Miles,” and hence the Funkadelic sample, in a 1998 movie.<sup>135</sup>

As noted above, cases such as *Newton v. Diamond* had by this time recognized the *de minimis* defense to claims of infringement on composition copyrights. *Bridgeport*, however, involved only the copyright in a sound recording, and the court held that the *de minimis* doctrine is

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<sup>126</sup> 17 U.S.C. § 107(3) (2006).

<sup>127</sup> 510 U.S. 569 (1994).

<sup>128</sup> *Id.* at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)); see also *Castle Rock Entm’t, Inc. v. Carol Publ’n Grp., Inc.*, 150 F.3d 132, 143 n.9 (2d Cir. 1998) (stating that a secondary work does not infringe the copyright of the original work if it “sufficiently transforms the expression of the original work”).

<sup>129</sup> See *supra* text accompanying notes 68–70 (describing the song).

<sup>130</sup> 410 F.3d 792 (6th Cir. 2005).

<sup>131</sup> *Id.* at 796.

<sup>132</sup> Tim Wu, *Jay-Z Versus the Sample Troll*, SLATE (Nov. 16, 2006, 1:50 PM), [www.slate.com/id/2153961](http://www.slate.com/id/2153961).

<sup>133</sup> See *Bridgeport Music*, 410 F.3d at 795 (stating that the action commenced in 2001).

<sup>134</sup> See WEINGARTEN, *supra* note 102, at 70–71.

<sup>135</sup> *Bridgeport Music*, 410 F.3d at 795.

unavailable in that context.<sup>136</sup> The court pointed to Sections 106 and 114(b) of the Copyright Act, which give the owner of the sound recording copyright the exclusive right to make derivative works “in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.”<sup>137</sup> *Bridgeport* interpreted this to mean that the owner of the sound recording copyright had the exclusive right to prepare *all* such works, without regard to limitations courts had imposed in other copyright contexts, such as the substantial similarity requirement or *de minimis* exception.

Some commentators decry *Bridgeport* for prohibiting the slice-and-dice approach.<sup>138</sup> But, like the condemnation of *Grand Upright*, this is a misreading of the holding. First of all, no form of sampling is prohibited as long as clearance is obtained. Second, and moreover, the case simply does *not* hold that clearance is required for slice-and-dice generally, or even for “100 Miles” specifically. Although the opinion glibly states at one point, “[g]et a license or do not sample,”<sup>139</sup> in fact, the holding is limited to rejecting the substantial similarity requirement and the related *de minimis* defense in the sound recording context. The court did not even hold “100 Miles” to be an infringing use. Rather, it reversed the lower court’s finding of noninfringement (which had been based on the *de minimis* defense) and remanded the case for a new trial. Indeed, the Sixth Circuit in *Bridgeport* specifically stated that the trial court on remand could consider a fair use defense (which had not been reached below) and the appeals court “express[ed] no opinion on its applicability to these facts.”<sup>140</sup>

Even to the extent that it rejected the *de minimis* defense in the context of sound-recording infringement, the import of *Bridgeport* is overstated. *Bridgeport* is the decision of only one circuit, and not one that is especially influential with respect to copyright law. Indeed, in a 1976 case involving an analog version of sampling, the Ninth Circuit stated that the “substantial

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<sup>136</sup> *Id.* at 798–802. The court found that the plaintiff, Bridgeport Music, did not own the rights to sample the composition; they had been retained by the previous owner of the composition. *Id.* at 796, 808.

<sup>137</sup> *Id.* at 799.

<sup>138</sup> See John Schietinger, *Bridgeport Music, Inc. v. Dimension Films: How the Sixth Circuit Missed a Beat on Digital Sampling*, 55 DEPAUL L. REV. 209, 209 (2005) (claiming that, due to *Bridgeport*, “the way DJ Shadow and others make music may change forever”); Gary Young, *Court Clamps Down on Sampling*, NAT’L L.J., Sept. 27, 2004 (stating that one music-industry lawyer believes *Bridgeport* will “kill off the art form of hip-hop”); Renee Graham, *Will Ruling on Samples Chill Rap?*, BOS. GLOBE, Sept. 14, 2004, at D1 (“[T]here’s little doubt that the judges who came to this devastating decision may well end up stifling the artistry and creativity their ruling sought to protect.”).

<sup>139</sup> *Bridgeport Music*, 410 F.3d at 801.

<sup>140</sup> *Id.* at 805. In an analogous case, the Second Circuit held that a visual artist was protected by fair use with respect to his painting that incorporated a recognizable scanned portion of a copyrighted photograph. *Blanch v. Koons*, 467 F.3d 244, 246, 256–58 (2d Cir. 2006).

similarity” requirement applies to sound recordings.<sup>141</sup> Moreover, it turns on a questionable interpretation of the Copyright Act. By rejecting the *de minimis* exception in the sound-recording context, *Bridgeport* effectively makes the scope of sound-recording copyrights broader than that of other copyrights. The statutory language and legislative history of section 114, however, strongly suggest that it was intended to make the scope of sound recording copyrights *narrower* than those of other copyrights.<sup>142</sup> In addition, at least one federal district court has explicitly rejected *Bridgeport* and applied the *de minimis* doctrine to find that a one-second sample did not infringe upon a sound recording copyright.<sup>143</sup>

The impact of *Bridgeport* is overstated for another reason. Whatever the legal arguments against *Bridgeport*’s reasoning, the opinion appears, like *Grand Upright* before it, to have been consistent with existing industry practices—practices under which sampling flourished. By the late 1980’s, it was well-established practice in the music industry to seek copyright permission both for lengthy, recognizable samples and for briefer, slice-and-dice samples.<sup>144</sup> In fact, NWA itself reportedly sought and obtained sample clearance when it originally recorded “100 Miles” in 1990.<sup>145</sup>

Indeed, *Bridgeport*’s differing treatment of *de minimis* borrowings from compositions and those from sound recordings seems to reflect earlier practice by the Beastie Boys. The aforementioned *Newton v. Diamond* case involved the 1992 Beastie Boys song, “Pass the Mic.”<sup>146</sup> The song included a sample of a brief flute passage from a recording of a jazz composition entitled *Choir*.<sup>147</sup> The Beastie Boys did not obtain permission from the composer, who owned the copyright in the composition, but

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<sup>141</sup> *United States v. Taxe*, 540 F.2d. 961, 965 (9th Cir. 1976) (“We believe the [jury] instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to consider ‘substantial similarity,’ and cured any error in the earlier part of the instruction.”). The defendants sold music they had made by re-recording (on audio tape) parts of pop-music recordings, altering the tapes, and combining them with other sounds. *Id.* at 964.

<sup>142</sup> See Leslie A. Kurtz, *Digital Actors and Copyright—From The Polar Express to Simone*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 783, 794–95 n.80 (2005) (“Section 14 . . . provides a limitation on a copyright owner’s exclusive rights, not a grant of additional rights.”).

<sup>143</sup> *Saregama India Ltd. v. Mosley*, 687 F. Supp. 2d 1325, 1327, 1338–41 (S.D. Fla. 2009). In a pre-*Bridgeport* case, the Southern District of New York stressed the importance of substantial similarity analysis in deciding whether sampling constituted infringement. *Williams v. Broadus*, No. 99 Civ. 10957 MBM, 2001 WL 984714, at \*3–5 (S.D.N.Y. Aug. 27, 2001).

<sup>144</sup> See *supra* notes 103–15 and accompanying text (describing clearance practices and slice-and-dice albums by the Beastie Boys, De La Soul, and Public Enemy in the late 1980s).

<sup>145</sup> See WEINGARTEN *supra* note 102, at 70–71. Note that this is yet another example of a sampler seeking copyright clearance prior to *Grand Upright*.

<sup>146</sup> *Newton v. Diamond*, 204 F. Supp. 2d 1244, 1246 (C.D. Cal. 2002).

<sup>147</sup> *Id.* (reporting that the defendants copied a three-note, six-second long sequence which they then looped).

avoided liability on *de minimis* grounds.<sup>148</sup> But while the Beastie Boys had not sought permission to use the *composition*, they *had* sought and obtained clearance to use the *sound recording*.<sup>149</sup> It is possible that, some thirteen years before *Bridgeport*, the Beastie Boys (or, more likely, the lawyers for their record label, Capitol/EMI) understood that a *de minimis* defense might excuse the unauthorized use of a composition, but might not apply in the sound-recording context.

Capitol/EMI may have sought sound-recording clearance for another reason—the same major record companies that release records containing samples also own huge back catalogs of recordings that might be sampled. They therefore have an economic incentive to support a rigid practice of sample clearance. As noted above, however, *Bridgeport* explicitly acknowledges the possibility of a fair use defense for the sampling of sound recordings. Thus, the decision may actually open the door to a legal treatment of slice-and-dice that is *more permissive* than the music industry's prevailing interpretation. Indeed, *Bridgeport's* acknowledgement of the fair-use defense may explain the recent invocation of that doctrine by the musician Girl Talk, who has openly refused to pay clearance fees for even the most obvious samples.<sup>150</sup>

### 3. *Law and Cost Do Not Necessarily Determine Cultural Practice*

Legal scholars' insistence that law is determinative of cultural participation is an example of thinking like a lawyer, not like an artist. Some practices are unaffected by the law, and factors other than law shape cultural practice. The potential cost of sample permission has been known since "Rapper's Delight" first became a hit, but this did not prevent sampling from becoming a dominant method of production in hip-hop and other kinds of pop music.

Despite the insistence of many musicians and commentators, the law has little impact on some kinds of sampling. Chuck D has complained that he had to obtain clearance even when samples were "unrecognizable."<sup>151</sup> Leading commentators insist that legal decisions spelled the end of "slice-and-dice" sampling.<sup>152</sup> It is theoretically possible that a clear requirement of permission for every sample could make clearing multiple samples extremely expensive. But such a rule would not necessarily preclude slice-and-dice sampling, due to a venerable legal principle: it's only illegal if

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<sup>148</sup> *Id.* at 1259.

<sup>149</sup> *Id.* at 1246.

<sup>150</sup> See Robert Levine, *Steal This Hook? D.J. Skirts Copyright Law*, N.Y. TIMES, Aug 7, 2008, at E1.

<sup>151</sup> MCLEOD, *supra* note 57, at 68.

<sup>152</sup> VAIDHYANATHAN, *supra* note 10, at 143 ("Rap music since 1991 has been marked by a severe decrease in the amount of sampling."); see also MCLEOD, *supra* note 57, at 82–83 (arguing that Public Enemy's classic albums could not be made today due to changes in the law).

you get caught. If samples of copyrighted material are sufficiently brief, obscure, and/or altered, or the resultant work is not widely distributed, the copyright holder may simply never know the material was used.<sup>153</sup> For such samples, *de minimis*, fair use and, indeed, all copyright laws, are irrelevant in practical terms. This principle is not limited to sampling; it applies to any uses of copyrighted material. DJ Shadow clearly understood this: In the early 1990s, he released several singles on small independent labels<sup>154</sup> without obtaining sample clearance.<sup>155</sup> He did not seek any clearances until the release of his first album in 1996, and even then he only sought them for a small number of recognizable samples: as Shadow noted, “there’s probably 1,000 samples on [the album] and I think we cleared 10 or so.”<sup>156</sup>

Even when the law does impose costs on sampling, artists may be willing to pay those costs for the sake of innovation. There is considerable irony in the “free culture” argument that strong copyright laws discourage sampling by increasing its cost. It is, in effect, the same argument behind the traditional economic *defense* of strong copyright laws: that protecting profitability is necessary to incentivize creativity.<sup>157</sup> The history of sampling, however, suggests otherwise. Profit potential may inspire imitation *after* an artistic innovation is made, but profit alone does not necessarily provide the incentive for such innovation. As noted above, for example, Steinski did not release his pioneering “Lesson 1” commercially due to concerns about clearance costs. Nonetheless, “Lesson 1” was widely played in clubs and on radio, and Steinski became a successful and highly influential record producer.<sup>158</sup> According to Steinski, “the legality of this doesn’t really make any difference to me . . . I mean, I’m gonna make the records no matter what.”<sup>159</sup> Even if the law should offer

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<sup>153</sup> Cf. Peter Dicola, *An Economic View of Legal Restrictions on Musical Borrowing and Appropriation*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE 235, 242 (Mario Biagioli et al. eds., 2011) (“Many musicians . . . can either distribute their recordings for free . . . or sell their recordings through small outlets . . . while hoping to avoid detection, litigation, or prosecution.”).

<sup>154</sup> See Discography, DJSHADOW.COM, <http://www.djshadow.com/discography#> (last visited Nov. 9, 2011).

<sup>155</sup> See Adam Heimlich, *The Shadow Sheds Light*, SALON.COM (Sept. 23, 1998), <http://www.salon.com/entertainment/music/int/1998/09/23int.html>.

<sup>156</sup> See *id.* (quoting DJ Shadow as saying he sought clearance for “things that I based an entire song on, just because I knew it’d be recognizable to whoever did it”). Based on this comment, it is unclear whether his sample-clearance practices were based solely on liability concerns, or whether they also reflect the ethical norms expressed by De La Soul and MC Hammer.

<sup>157</sup> The Copyright Clause of the U.S. Constitution reflects this basic theory: it empowers Congress to protect the intellectual property rights of “Authors and Inventors” in order “to promote the Progress of Science and useful Arts.” U.S. CONST. art. I, § 8, cl. 8.

<sup>158</sup> See WNYC Soundcheck, *Steinski Gives a Sampling History Lesson*, NPR (Oct. 22, 2008), <http://www.npr.org/templates/story/story.php?storyId=93844583>.

<sup>159</sup> *Id.*

incentives for recoding, the law need only guarantee appropriators a chance at a reasonable reward—not *all* the proceeds from the derivative work. Indirect rewards have evidently been sufficient to incentivize Steinski.

The more recent story of *The Grey Album* is similar. In 2004, Danger Mouse (Brian Burton) mixed the vocals from rapper Jay-Z's 2003 *The Black Album* with music sampled from the Beatles' self-titled 1968 album, commonly known as *The White Album*.<sup>160</sup> When the result, *The Grey Album*, appeared for sale online, the EMI record label accused Burton and the retailers of infringing upon its copyright in the *White Album* sound recording.<sup>161</sup> Burton argued that it had been released without his permission, and had been intended as a noncommercial "art project."<sup>162</sup> He became something of a *cause célèbre* among anti-copyright activists, even though he expressly denied any intent to challenge copyright laws, and readily cooperated with EMI in stopping online sales.<sup>163</sup> *The Grey Album* was thus removed from the market, but as "Lesson 1" did for Steinski, it established Burton as a significant musician and producer, and inspired legions of imitators in the so-called "mashup" genre of similarly hybridized songs.<sup>164</sup>

Some commentators assert, with no real evidence, that less sampling has occurred in the post-*Grand Upright* era.<sup>165</sup> Such a claim is difficult to support without an exhaustive longitudinal study of records. But, even assuming such a change occurred, it could have had causes other than case law, such as a change in the styles and methods preferred by artists (or their audiences). Many commentators complain that the classic slice-and-dice albums by Public Enemy, De La Soul, and the Beastie Boys could not be made today due to the cost of obtaining clearances,<sup>166</sup> but even if true, the complaint is an odd one. Those important albums *were* made, over two decades ago, and it is unclear why it would be necessary to make the same (or fundamentally similar) albums again.<sup>167</sup> On their next album after *Paul's Boutique*, the Beastie Boys used far less sampling and played their

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<sup>160</sup> See MATTHEW RIMMER, DIGITAL COPYRIGHT AND THE CONSUMER REVOLUTION: HANDS OFF MY IPOD 132 (2007).

<sup>161</sup> *Id.* at 133.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See *id.* at 145–46 (stating that Jay-Z and the rock group Linkin Park collaborated on a series of "mash-ups" in an effort to emulate the success of *The Grey Album* and that, despite his alleged copyright infringement actions, Burton has been "fêted" by members of the musical industry).

<sup>165</sup> See, e.g., VAIDHYANATHAN, *supra* note 10, at 143 ("Rap music since 1991 has been marked by a severe decrease in the amount of sampling.").

<sup>166</sup> See, e.g., MCLEOD, *supra* note 57, at 82–83; WEINGARTEN, *supra* note 102, at 41.

<sup>167</sup> See *infra* Section III.B.1 (arguing that musical forms should not be subject to "static reification").



own instruments.<sup>168</sup> Band member Mike Diamond made a good argument for this artistic change, as well as for the general irrelevance of the law: "I don't know if I'd say that *Paul's Boutique* took the sampling thing as far as it could be taken, but we came close. So we definitely didn't want to jump right back into that same direction."<sup>169</sup>

Just as artists may have decided to move on, the record industry seems to have recognized the greater sales potential of simpler hip-hop records with recognizable tunes instead of multiple samples. Two songs released in 1990—"U Can't Touch This," by M.C. Hammer, and "Ice Ice Baby" by Vanilla Ice—became two of the biggest hip-hop singles of all time.<sup>170</sup> Each of these songs was, like "Rapper's Delight," a relatively simple combination of a rap and the hook from a famous pop hit.<sup>171</sup>

Legal disputes over sampling are not determinative of creative innovation or the distribution of semiotic power. Rather, they are disputes among members of the media industry over the distribution of the proceeds from an existing, profitable method of joint production. The music industry arrived at a method of distributing these proceeds by contract, allowing innovation to proceed. This is not to say formal law is irrelevant: the contracting was clearly based on the legal entitlements set out in the Copyright Acts of 1909 and 1976.<sup>172</sup> The legal norm of negotiated sample clearance did not prevent the development of hip-hop—to the contrary, it can be seen as an important part of the development of hip-hop as an art form and as an industry.

History shows, then, that commentators have greatly exaggerated copyright law's stifling effect on recoding in popular music. Lawyers and legal academics are (unsurprisingly) likely to overestimate the ability of law to constrain productive and creative behavior. Copyright owners' statutory entitlements are thus often portrayed as insuperable barriers to sampling. The economic analysis of law, however, teaches that legal entitlements can be reallocated by bargaining, at least where transaction costs are sufficiently low.<sup>173</sup> That is, even if the right to sample belongs to a copyright holder, a would-be sampler should be able to obtain permission, as long as the costs of information, negotiation, and the like

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<sup>168</sup> COLEMAN, *supra* note 103, at 16.

<sup>169</sup> *Id.* at 17.

<sup>170</sup> DAN CHARNAS, *THE BIG PAYBACK: THE HISTORY OF THE BUSINESS OF HIP-HOP* 280–81 (2010).

<sup>171</sup> See KEMBREW MCLEOD ET AL., *CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING* 4, 113 (2011) (noting that "Ice Ice Baby" contains the bass line to Queen and David Bowie's "Under Pressure," most of Rick James' "Superfreak" is used in MC Hammer's "U Can't Touch This," and Chic's "Good Times" features prominently in "Rapper's Delight").

<sup>172</sup> See *supra*, Section II.A.2.

<sup>173</sup> See, e.g., Ian Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235, 235–36 (1995).

are not prohibitive.

While it cannot be *assumed* that bargaining can overcome transaction costs in a given context,<sup>174</sup> history suggests that they were with respect to sampling. In Calabresi and Melamed's famous formulation,<sup>175</sup> copyright law allocates sampling rights under a "property rule"<sup>176</sup>—under which a would-be user must bargain with the owner—as distinct from a "liability rule"<sup>177</sup>—under which a user may use without permission as long as the user pays damages. Copyright law is a "property" regime because statutory damages under the Copyright Act are not limited to the owner's actual damages.<sup>178</sup> Moreover, the Act authorizes courts to use injunctions "to prevent or restrain infringement of a copyright,"<sup>179</sup> (as seen in *Grand Upright*) and copyright violations can be punished as crimes.<sup>180</sup>

Calabresi and Melamed argued that because liability rules facilitate the transfer of entitlements, they are preferable when transaction costs are high.<sup>181</sup> Some commentators have argued in favor of compulsory licensing of copyrighted works in order to facilitate licensing.<sup>182</sup> Such an approach

<sup>174</sup> See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 174–78 (1988).

<sup>175</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–93 (1972).

<sup>176</sup> *Id.* at 1092 (noting that the property rule involves "a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement," i.e., it permits each of the parties to say how much the entitlement is worth to him).

<sup>177</sup> *Id.* at 1105–06 (defining liability rule as "an external, objective standard of value . . . used to facilitate the transfer of the entitlement from the holder to the nuisance").

<sup>178</sup> See 17 U.S.C. § 504(b) (2006) (entitling a copyright-infringement plaintiff to receive both actual damages and the infringer's profits); *id.* § 504(c) (allowing a plaintiff to elect statutory damages instead of actual damages); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441–43 (2009) (arguing that statutory-damages awards are "arbitrary . . . and sometimes grossly excessive").

<sup>179</sup> 17 U.S.C. § 502(a).

<sup>180</sup> See *id.* § 506(a).

<sup>181</sup> Calabresi & Melamed, *supra* note 175, at 1127.

<sup>182</sup> William Fisher has made perhaps the most fully developed compulsory-licensing proposal. See WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199–259 (2004).

The Copyright Act currently contains a compulsory licensing regime, but it applies only to licensing new recordings of a musical work that has previously been recorded and publicly released. 17 U.S.C. § 115(a)(1). Such new recordings are commonly referred to as "cover versions." Any person may make and distribute phonorecords of a cover version, without permission of the owner of the original work, provided the person provides notice to the owner and pays the owner the statutory royalty rate. *Id.* § 115(b)–(c). Furthermore, the cover version "shall not change the basic melody or fundamental character of the work." *Id.* § 115(a)(2). Thus, for example, if Biz Markie had wanted to record and release his own cover version of Gilbert O'Sullivan's "Alone Again, (Naturally)," he could have done so without permission, provided he paid the statutory royalty.

Songs using digital samples, however, do not qualify for compulsory licenses. Take Markie's actual "Alone Again" rap song, for example. First of all, the rap song changed both the "basic melody" and the "fundamental character" of the composition. Second and moreover, Markie used a sample from O'Sullivan's 1970 *record*, and the copying of sound recordings is expressly excluded from the compulsory licensing scheme. *Id.* § 115(a)(1) ("A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another,

would be a “liability” regime in that it would allow users to “take and pay” without obtaining permission. The history of sampling described above, however, suggests that a “property” approach to sampling rights has been appropriate thus far because transaction costs have been sufficiently low. The music industry, faced with a property regime that potentially slowed the transfer of sampling rights, responded by reducing transaction costs. Sample clearance is simply one example of the transfer of copyright entitlements. Such transfers are a basic part of the music industry. If members of the industry had disagreed over whether sample clearance was necessary (that is, over who owned the entitlement to sample), it might have increased the transaction costs of each negotiation. But the evidence discussed above strongly indicates that there was a consensus that sampling rights belonged to copyright holders.<sup>183</sup> Transaction costs are likely to have fallen further as sampling became more common and the industry established business practices for seeking and granting clearance, such as dedicated employees and indemnification clauses,<sup>184</sup> and, more recently, online clearance processing.<sup>185</sup> Indeed, the evidence in *Grand Upright* suggests that obtaining clearance was normally as simple as sending out a few letters and making a few phone calls, which need not even hold up the release of a record.<sup>186</sup>

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unless . . . the making of the phonorecords was authorized by the owner of the copyright in the sound recording . . .”). That is, the scheme applies only to a recording of a new *performance* of a song, and not to a recording that incorporates an existing *recording* of a song.

<sup>183</sup> This follows from the fact that samplers are themselves artists and record labels with an interest in protecting their own intellectual property.

<sup>184</sup> See the industry practices described in the *Grand Upright* testimony, *supra* Section II.A.3.

<sup>185</sup> See STIM, *supra* note 120, at 179–80 (describing the practice by websites to include a linking disclaimer in order to minimize liability for activities that occur when a visitor is taken to a linked website).

<sup>186</sup> Transaction costs of obtaining permission can be high if the work is an “orphan”—that is, if the copyright owner is difficult to identify and/or contact. But this problem could be addressed by relatively modest reforms far short of a compulsory licensing regime. In Canada, for example, a person seeking copyright permission who cannot locate the owner may petition the Canadian Copyright Board for a license, which will be granted if the user has conducted a reasonable search. See Canadian Copyright Act, R.S.C., 1985, c. C-42, 77. The Board will also set a reasonable fee, which the user must deposit into a fund from which the owner may collect if she comes forward at a later time. See *id.* at 78. The U.S. Copyright Office has suggested a reform like Canada’s “reasonable search” rule. Pamela Samuelson et al., *Copyright @ 300: The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1235–36 (2010). It has, however, rejected the idea of a fund like Canada’s. See Jeremy de Beer & Mario Bouchard, *Canada’s Orphan Works Regime: Unlocatable Copyright Owners and the Copyright Board* (report sponsored by the Copyright Board of Canada), available at <http://www.cb-cda.gc.ca/about-apropos/2010-11-19-newstudy.pdf>.

When Google was recently sued for making digital copies of copyrighted books online, it proposed a settlement that, like Canada’s statutory scheme, involved an escrow fund should the owners of orphan works come forward in the future. Pamela Samuelson, *The Google Books Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 524. The settlement was, however, rejected by a federal court in March 2011 and no settlement had been approved as of fall 2011. See Julie Bosman, *Judge Sets Schedule in Case Over Google’s Digital Library*, N.Y. TIMES, Sept. 15, 2011, at B8.

### III. CULTURAL AUTONOMY?

#### A. *Recoding's Ambivalent Relationship to Semiotic Democracy*

As a historical matter, then, copyright law has not prevented the development of sampling. Many commentators argue that this is not enough, however; they insist that the law should affirmatively *facilitate* recoding in order to further semiotic democracy. For example, as noted above, many commentators argue for a compulsory licensing regime, either at centrally determined rates or at no charge. By limiting a copyright owner's control over derivative works and allowing users to simply "take and pay," a compulsory licensing regime would likely lower users' costs. But it would do so by externalizing and subsidizing those costs; therefore, it would not necessarily lower overall costs. A compulsory licensing regime would subsidize users in that the public would bear the considerable expense of administering such a regime.<sup>187</sup> Indeed, the huge costs of creating and administering a comprehensive compulsory licensing system could even end up *increasing* the total costs of copyright licensing.<sup>188</sup>

Whether the law should subsidize or otherwise facilitate recoding depends on whether recoding is good for society. Even assuming recoding advances semiotic democracy, subsidizing *any* method of cultural production could do the same. The cost of a sample clearance, or other type of copyright permission, is not significantly different from other costs of cultural participation and expression, such as education, computers and Internet connectivity, paint and canvas, or musical instruments. It is hardly clear why, in a world of limited resources, copyright permission should be subsidized while support for these other creative inputs remains limited.

The question, of course, is whether sampling and other kinds of recoding have special social value, such as furthering semiotic democracy. Addressing this question underscores the great irony of "free culture" theory. On the one hand, as argued above in Part II, copyright law is far friendlier to recoding than these theorists tend to believe. On the other hand, as will be argued in this Part, recoding itself has potential negative effects on semiotic democracy. The current academic discourse tends to consider only the potential positive effects of recoding on cultural participation. The central insight of the original theorists of semiotic democracy and recoding, however, was that recoding had *both* positive *and* negative effects on cultural participation. Today's legal academics need

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<sup>187</sup> See FISHER, *supra* note 182, at 169.

<sup>188</sup> William Fisher's very thoughtful and thorough proposal for a compulsory licensing regime, for example, involves an immense amount of costly administrative tasks, many of which are beyond the capability of existing technology. See *id.* at 203–58.

not agree with those previous cultural critics; it is of course appropriate to challenge and “recode” earlier concepts. But the “recoding of recoding” in contemporary intellectual property law has not seriously engaged the original arguments; rather, it has largely ignored them.

The term “semiotic democracy” and its underlying theory were formulated by the pioneers of “Cultural Studies,” a neo-Marxist academic movement in the United Kingdom.<sup>189</sup> Liberalism understands the dangers of an overbearing state, but tends to have excessive faith in the ability of formally equal competition to allocate wealth and other forms of power fairly and efficiently. Conversely, Marxist-influenced schools of thought, like Cultural Studies, may underestimate the risks of state control, but their critique of liberal capitalism offers insight into the limitations of allowing power to be allocated via “market competition.”<sup>190</sup>

In the 1930s and 1940s, German-American academics of the so-called “Frankfurt School” argued that the “culture industry” manipulates the public into buying and enjoying mass-produced cultural products.<sup>191</sup> Theodor Adorno, for example, argued that the music industry manufactures popular music from simple, standardized patterns and conditions the public to expect and respond favorably to such patterns.<sup>192</sup> In the 1970s and 1980s, Cultural Studies theorists modified this overly patronizing view. They agreed that the public’s consumption and enjoyment of commercial mass culture is not fully autonomous, but argued that it is not *entirely* manipulated either. The culture industries attempt to impose their view of reality on the public, but meet with a mixture of success and resistance. Dick Hebdige, for example, argued that youth subcultures in postwar Britain (such as mods, rockers, and punks) appropriated “mundane” consumer commodities—“a safety pin, a pointed shoe, a motor cycle”—and imbued them with alternative “meanings which express, in code, a form of resistance to the order which guarantees their continued subordination.”<sup>193</sup>

This concept of appropriation and redefinition—which has come to be called “recoding”—became a central part of Cultural Studies theory.

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<sup>189</sup> See, e.g., JOHN FISKE, TELEVISION CULTURE 236–39 (1987) (arguing that “[t]elevision’s playfulness is a sign of its semiotic democracy”); Hall, *supra* note 25, at 232–33 (arguing that people are not “purely passive” consumers of commercial culture, but they are subject to “cultural power and domination” that results in a continuous “dialectic of cultural struggle”); *id.* at 239 (arguing that popular culture “is one of the places where socialism might be constituted”).

<sup>190</sup> William Fisher’s proposal to remake copyright law is a bit of a hybrid: he seeks to realize a combination of liberal participatory values and material goals (such as supplying affordable cultural products and increasing economic production) through an ambitious plan of state action. FISHER, *supra* note 182, at 202–03.

<sup>191</sup> See *supra* note 5 and accompanying text.

<sup>192</sup> See THEODOR W. ADORNO, *On Popular Music*, in ESSAYS ON MUSIC 437, 441–44 (Richard Leppert ed., 2002).

<sup>193</sup> DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE 2, 18 (Terence Hawks ed., 1979).

According to Stuart Hall, a central figure in the development of Cultural Studies,<sup>194</sup> members of the public are not merely “cultural dopes,” but are able to recognize the ways their lives are “reorganised, reconstructed, and reshaped” by the way the media depicts them.<sup>195</sup> Building on this notion, John Fiske coined the related term “semiotic democracy” to describe television.<sup>196</sup> Fiske asserted that television viewers question the intended meaning of television programming and assign their own alternative meanings to it, thereby deriving their own kind of pleasure from it.<sup>197</sup> Cultural Studies theorists maintained, however, that the autonomy of the media audience “is only relative, and never total.”<sup>198</sup> The culture industries constantly attempt to push meanings onto the public, and individuals constantly push back by recoding: Hall termed this “the dialectic of cultural struggle.”<sup>199</sup> Cultural appropriation, then, involves *both* autonomy *and* domination.

Art and architecture critic Hal Foster expanded on Cultural Studies theory in the 1980s and coined the term “recoding.”<sup>200</sup> Foster noted that most of his contemporaries in the art world saw cultural appropriation as “a parodic collage of the privileged signs of gender, class and race” that exposes and resists “the false nature of these stereotypes.”<sup>201</sup> “Free culture” theorists tend to espouse this vision, and even attribute it to Foster.<sup>202</sup> Foster, however, did *not* subscribe to this view. Rather, he believed that these subversive aspirations were doomed to fail.<sup>203</sup> Questioning cultural meanings does *not* challenge the cultural status quo, he argued, because liberal capitalism does not depend on a set of fixed cultural meanings.<sup>204</sup> To the contrary, he asserted, it depends on the appearance of variety and consumer choice: “In our system of commodities, fashions, styles, art works . . . it is difference that we consume.”<sup>205</sup> Thus, “[t]o expose its false nature, to manipulate its

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<sup>194</sup> David Morley & Kuan-Hsing Chen, *Introduction*, in *THE STUART HALL READER* 1, 3 (Morley & Chen eds., 1996) (describing Hall’s work as “a catalyst for critical dialogues and as a key site on which they have taken place within cultural studies, since the mid-1980s).

<sup>195</sup> Hall, *supra* note 25, at 232–33.

<sup>196</sup> See FISKE, *supra* note 189, at 236–39.

<sup>197</sup> See *id.* at 19.

<sup>198</sup> *Id.* at 310.

<sup>199</sup> Hall, *supra* note 25, at 232–33.

<sup>200</sup> HAL FOSTER, *RECODINGS: ART, SPECTACLE, CULTURAL POLITICS* 170 (1985).

<sup>201</sup> *Id.* at 170–71.

<sup>202</sup> See Keith Aoki, *Adrift in the Intertext: Authorship and Audience “Recoding” Rights*, 68 CHI-KENT L. REV. 805, 810 n.33 (1993) (quoting Foster’s *RECODINGS: ART, SPECTACLE, CULTURAL POLITICS* as a means to provide greater clarity to the definition of “recoding”); Coombe, *supra* note 7, at 1864 n.62 (citing FOSTER, *supra*, as general support for her view that recoding advances semiotic democracy).

<sup>203</sup> FOSTER, *supra* note 200, at 170–71.

<sup>204</sup> *Id.* at 171.

<sup>205</sup> *Id.*

differences hardly constitutes resistance, as is commonly believed: *it simply means you are a good player, a good consumer.*"<sup>206</sup> Capitalism, then, welcomes recoding, by incorporating and co-opting it—such has been the fate of nearly every youth subculture based on recoding, from rock 'n' roll to punk to hip-hop.<sup>207</sup>

Despite Foster's warning, the U.S. legal academy has recoded both "semiotic democracy," and "recoding" itself, to conform to liberal-individualist assumptions. In American intellectual property scholarship, "semiotic democracy" and "recoding" are used to connote purely autonomous cultural participation<sup>208</sup>—something Cultural Studies theorists deemed impossible. Thus, U.S. intellectual property scholars writing in this vein, like most American followers of Cultural Studies, have largely ignored the Marxist insights that were fundamental to the original semiotic democracy theory.<sup>209</sup>

Recoding can have both positive and negative effects on semiotic democracy. These potentially conflicting effects are abstract and beyond empirical measurement; thus, it is impossible to reach a meaningful cost-benefit calculation of the "net effect."<sup>210</sup> Rather, copyright policy must be candid about the potential positive and negative effects of law and consider the *kinds* of benefits society values categorically—and the kinds of harms society is willing to tolerate. "Free culture" proponents implicitly accept formally equal expression and participation rights as a more important value than correcting power disparities *per se*. This is hardly unusual—it is, after all, the heart of liberalism. But it is in considerable tension with their professed concern for the actual distribution of cultural influence in society.

## B. Subsidizing Recoding, Discouraging Innovation

### 1. The Static Reification Fallacy

Copyright critics are fond of pointing out that imitation and borrowing are used in many types of cultural production. Many of them further assert that hip-hop is particularly dependent on borrowing,<sup>211</sup> and more

<sup>206</sup> *Id.* (emphasis added).

<sup>207</sup> Cf. Dick Hebdige, *The Meaning of Mod*, in *RESISTANCE THROUGH RITUALS* 87, 93–94 (Stuart Hall & Tony Jefferson eds., 1976) (describing the death of "mod" as a subculture and its assimilation into popular culture).

<sup>208</sup> See *supra* notes 7–12 (citing Lessig, Coombe, and Madow).

<sup>209</sup> See Morley & Chen, *supra* note 194, at 4–5 (arguing that the American adaptation of Cultural Studies "has tended to result in the loss of its original political commitments").

<sup>210</sup> Cf. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 539–44 (1990) (arguing that a utilitarian evaluation of copyright law is conceptually and empirically impossible to perform).

<sup>211</sup> See, e.g., LESSIG, *supra* note 4, at 9 ("Rap music is a genre that is built upon 'ripping' (and, relatedly, 'sampling') the music of others [and] mixing that music with lyrics or other music.").

specifically, on borrowing that conflicts with copyright law.<sup>212</sup> Thus, they argue, copyright law threatens semiotic democracy in that it would discourage new voices—many of them African-American—from participating in making cultural meanings.<sup>213</sup> But this view exemplifies intellectual property scholars' failure to consider recoding's potential negative implications for semiotic democracy.

Commentators on any subject tend to essentialize and reify the subject in order to make it more amenable to analysis.<sup>214</sup> But any art form, indeed any complex phenomenon, is multifaceted at any one point in time, as well as dynamic across time. Stuart Hall criticized the idea that any cultural form has a "fixed and unchanging meaning or value."<sup>215</sup> Similarly, jazz historian Ted Gioia has bemoaned the tendency of jazz historians and critics to employ oversimplified "static models of jazz."<sup>216</sup> Hip-hop has been subjected to the same kind of essentialization. For example, one of the leading intellectual-property commentators has argued that both jazz and hip-hop consist primarily of copying existing works and grafting new elements onto them.<sup>217</sup> Another prominent commentator has argued that sampling is the "soul" of hip-hop music.<sup>218</sup> Yet another has asserted that "the question of whether and how sampling should be permitted is in some measure an inquiry about how and to what extent hip hop can and should continue to exist as a musical form."<sup>219</sup> According to Rosemary Coombe, intellectual property law can stifle certain kinds of creative and critical practices "[b]y objectifying and reifying cultural forms—freezing the connotations of signs and symbols."<sup>220</sup> Ironically, the argument that copyright threatens hip-hop is based on a similar "freezing" of music. In fact, many hip-hop musicians define it by its eclecticism—that is, by its very lack of essential elements.<sup>221</sup>

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<sup>212</sup> VAIDHYANATHAN, *supra* note 10, at 133 ("[C]opyright has been deeply entrenched in the western literary tradition for centuries, but does not play the same role in African, Caribbean, or African American oral traditions.").

<sup>213</sup> See, e.g., *id.* at 148 ("Ethnocentric notions of creativity and a maldistribution of political power in favor of established artists and media companies have already served to stifle expression—the exact opposite of the declared purpose of copyright law.").

<sup>214</sup> See, e.g., Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporation Law*, 35 U.C. DAVIS L. REV. 779–80 (2002). I admit to essentializing and reifying "free culture" scholarship in this Article, but the basic gist of the scholars quoted here is remarkably consistent.

<sup>215</sup> Hall, *supra* note 25, at 237.

<sup>216</sup> Ted Gioia, *The Ghost in the Machine*, in *THE FUTURE OF JAZZ* 189, 192–96 (Yuval Taylor ed., 2002), quoted in JOHN GENNARI, *BLOWIN' HOT AND COOL: JAZZ AND ITS CRITICS* 4 (2006).

<sup>217</sup> LESSIG, *supra* note 4, at 9; cf. *Jazz Has Got Copyright*, *supra* note 58, at 1944 (asserting, incorrectly, that jazz consists primarily of reinterpretations of pop and Broadway "standards").

<sup>218</sup> See VAIDHYANATHAN, *supra* note 10, at 144.

<sup>219</sup> Arewa, *supra* note 10, at 630.

<sup>220</sup> Coombe, *supra* note 7, at 1866.

<sup>221</sup> Heimlich, *supra* note 65 (quoting hip-hop artist DJ Shadow as saying, "[n]o boundaries, no genre barriers . . . That is to me what hip-hop is about").



Intellectual property commentators tend to portray sampling as an insurgent and beleaguered form of underground art, and argue that it is essential to hip-hop. Both of these contentions are questionable. Sampling is a venerable, ubiquitous, and profitable method of musical production that is neither necessary to, nor specific to, hip-hop music.<sup>222</sup> One commentator argues that because clearance requirements (supposedly created by *Grand Upright*) allowed copyright holders to deny permission to “transgressive” sampling, samples in 1990s hip-hop became “nonthreatening, and too often clumsy and obvious.”<sup>223</sup> But like the rest of the music industry, hip-hop has not required legal pressure to produce “nonthreatening” and “obvious” pop music. Indeed, as noted above, rap’s first national hit, “Rapper’s Delight,” and two of its biggest hits, “U Can’t Touch This” and “Ice Ice Baby,” borrowed directly and obviously from other contemporaneous hit songs.<sup>224</sup> All of these songs, and many other similar hybrids, predate *Grand Upright*. The latter two were contemporaneous with (and far more popular than) the work of more experimental and “transgressive” samplers such as Public Enemy, De La Soul, and the Beastie Boys.<sup>225</sup>

Not all sampling appears in hip-hop, and not all hip-hop performances or recordings use digital samples or other manipulations of copyrighted recordings. As noted in Part II of this article, sampling in hip-hop has clear, direct antecedents in earlier pop-music practices. Indeed, many commentators seem to assume that sampling is inherently innovative, even as they point out that appropriation is as old as music itself.<sup>226</sup>

While the sampling-like work of DJs is an important influence, hip-hop also has other kinds of musical predecessors, such as the work of spoken-word artists of the late 1960s and early 1970s, such as Gil-Scott Heron and the Last Poets.<sup>227</sup> Musicologists trace the deeper roots of rap back to the oral traditions of West Africa and the rural American South.<sup>228</sup> Furthermore, as in any art form, methods and styles vary among

<sup>222</sup> Jeff Chang’s magisterial history of hip-hop culture, a winner of the American Book Award, barely mentions sampling (and does not mention the legal issues surrounding sampling at all). See generally CHANG, *supra* note 15. In addition, a recent major scholarly work on the art of hip-hop, published by Yale University Press, focuses entirely on rap lyrics. See THE ANTHOLOGY OF RAP, *supra* note 31, at xxxv. Furthermore, hip-hop did not introduce digital sampling to pop music. See *infra* note 263 and accompanying text (discussing Trevor Horn’s use of the Fairlight synthesizer).

<sup>223</sup> VAIDHYANATHAN, *supra* note 10, at 143.

<sup>224</sup> See *supra* notes 49–50, 62–66 & 170–71 and accompanying text.

<sup>225</sup> See *supra* notes 103–115 and accompanying text (describing albums by these artists).

<sup>226</sup> See Arewa, *supra* note 10, at 609–10 (discussing the tradition of borrowing in classical music and its importance as a source of innovation).

<sup>227</sup> See Alec Wilkinson, *New York is Killing Me*, NEW YORKER, Aug. 9, 2010, at 26, 30 (quoting rap legend Chuck D as calling Scott-Heron and the Last Poets “the roots of rap”).

<sup>228</sup> See Cheryl L. Keyes, *The Roots and Stylistic Foundations of the Rap Music Tradition*, in THE HIP HOP READER 3, 4–8, 10–11 (Tim Strode & Tim Wood eds., 2008).

practitioners, and are debated among them as well.

From the beginnings of hip-hop music and continuing to the present, the use of copyrighted recordings has been only one of many technological tools for producing the instrumental aspects of hip-hop music. As the influential group Stetsasonic rapped in 1988: “You see, you misunderstood/ A sample is a tactic/ A portion of my method, a tool/ In fact it’s only of importance when I make it a priority.”<sup>229</sup> By analogy, jazz music often uses saxophones and trumpets, but no particular instrument is considered “essential” technology for the making of jazz. Since the earliest days of hip-hop, many significant works contained no potentially infringing samples. For example, two of the most influential early hip-hop singles, 1982’s “The Message” by Grandmaster Flash and the Furious Five and “Looking for the Perfect Beat” by Afrika Bambaataa and Soulsonic Force, consisted of raps accompanied by original music played on synthesizers, keyboards, and drum machines.<sup>230</sup> Some hip-hop songs consist of rap or other vocals with no instrumental accompaniment. Stetsasonic, the Beastie Boys, and more recently, Grammy-award winning artists OutKast and the Roots are among the many important hip-hop groups that both sample and play their own compositions on their own instruments.<sup>231</sup>

Many critics of copyright correctly argue that composition often includes appropriation, and that the line between infringement and “original” composition is a blurry one.<sup>232</sup> But this blurriness is hardly unusual—the law is full of flexible, context-specific “standards.” Moreover, this particular imperfect distinction has necessarily existed as long as copyright in music has existed, and it has not crushed semiotic democracy or musical innovation. As the leading copyright treatise points out, “almost all works are derivative works in that in some degree they are

<sup>229</sup> STETSASONIC, *Talkin’ All that Jazz, on IN FULL GEAR* (Tommy Boy Records, 1988).

<sup>230</sup> See Richard Buskin, *Afrika Bambaataa and the Soulsonic Force: “Planet Rock,”* SOUND ON SOUND (2008), [http://www.soundonsound.com/sos/nov08/articles/classictracks\\_1108.htm](http://www.soundonsound.com/sos/nov08/articles/classictracks_1108.htm) (quoting producer Arthur Baker as saying, “[n]othing on that record [“Looking for the Perfect Beat”] was borrowed from anyone”); Mark Richardson, *Review of Grandmaster Flash & The Furious Five, The Message*, PITCHFORK.COM, July 14, 2005, <http://pitchfork.com/reviews/albums/11751-the-message-they-said-it-couldnt-be-done/> (noting the song’s “squelchy synth riff”).

<sup>231</sup> See Kelefa Sanneh, *Believe the Hype: Hip-hop and Its Discontents*, 80 TRANSITION 120, 123 (1999) (discussing a Stetsasonic song featuring “a live (i.e., nonsampled) synthesizer line”); Kathy McCabe, *Outkast Double the Funk*, DAILY TELEGRAPH (Sydney, Australia), Dec. 18, 2003, at T12 (discussing a member of Outkast’s ability to play clarinet and saxophone); Craig Rosen, *Rap in Evolution: Old School, New Frontiers; Modern Rock Opens Doors to Rap Tracks*, BILLBOARD, Jun. 25, 1994, at 1 (noting the Beastie Boy’s transformation from punk band to rap group); Allison Samuels, *Taking Rap Back to Its Real Roots*, NEWSWEEK, Mar. 15, 1999, at 68 (reviewing The Roots’ album “Things Fall Apart”).

<sup>232</sup> See, e.g., Arewa, *supra* note 10, at 571–72 (“[I]t is not always clear in music how much originality is required to make something copyrightable.”).

derived from pre-existing works.”<sup>233</sup> It is important to note, however, that “[a] work is not derivative [in the legal sense] unless it has *substantially* copied from a prior work.”<sup>234</sup> Indeed, the prevalence of copying in popular culture does not prove that copyright law threatens pop culture; it proves just the opposite.<sup>235</sup>

## 2. From Innovation to Cliché

Commentators’ insistence that sampling remains “innovative,” “transgressive,” or essential to hip-hop is based on a static view of artists’ preferred methods and their meaning within an art form. A dynamic view appreciates that the meaning of sampling could transform over time. The mere act of “recoding” pop culture is no longer, by itself, an important or novel artistic statement (if indeed it ever was). Biz Markie’s use of a rap over a recognizable pop melody in 1991 was basically the same concept “Rapper’s Delight” used in 1979. Danger Mouse’s *The Grey Album* was, in both sound and technique, reminiscent of earlier hip-hop records, such as those by Grandmaster Flash and Steinski. Indeed, the central gimmick of *The Grey Album*—raps set to tracks constructed from Beatles samples—was heard fifteen years earlier on the Beastie Boys’ aforementioned *Paul’s Boutique* album.<sup>236</sup>

Despite its importance to early hip-hop, many hip-hop artists came to deride sampling as it became ubiquitous. Beans (Robert Stewart), a founding member of influential and innovative hip-hop group Anti-Pop Consortium, has said, “I’m not into sampling much. If you’re trying to bring about tomorrow, don’t take sh-t from yesterday.”<sup>237</sup> Similarly, Dan “The Automator” Nakamura, an influential producer and DJ, argued over a decade ago, “[t]here’s no new R&B music out there today, because it’s all stolen from the past.”<sup>238</sup> Imani Coppola had a hip-hop influenced pop hit in 1997 with “Legend of a Cowgirl,” which was built around a sample from a 1966 pop song.<sup>239</sup> Just a year later, she said, “I am a

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<sup>233</sup> 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.01, 3-2 (Matthew Bender ed., 2011).

<sup>234</sup> *Id.* § 3-3.

<sup>235</sup> Cf. Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 947 (1999) (pointing out that much of the recoding in pop music is perfectly permissible under intellectual property law).

<sup>236</sup> The Beastie Boys’ song, “The Sounds of Science,” was built in part from the Beatles’ “The End” and “Sgt. Pepper’s Lonely Hearts Club Band (Reprise).” COMPARE BEASTIE BOYS, PAUL’S BOUTIQUE (Capitol Records 1989), with THE BEATLES, SGT. PEPPER’S LONELY HEARTS CLUB BAND (Capitol Records 1967).

<sup>237</sup> Ethan Brown, *Genre Bender*, WIRED, Mar. 2003, at 61, available at <http://www.wired.com/wired/archive/11.03/play.html?pg=2> (quoting Beans).

<sup>238</sup> Thor Christensen, *(Old Sounds) New Spin; Rampant Sampling Makes Many in the Music Biz Wonder Whether Pop’s Creativity has Crashed*, DALL. MORNING NEWS, Apr. 12, 1998, at 1C.

<sup>239</sup> *Id.*

hypocrite . . . [b]ut I hate sampling . . . [i]t's gonna be the joke of music history."<sup>240</sup>

As one critic has observed, "[i]n pop [culture], every wave of innovation . . . inevitably heralds a host of new clichés and conventions."<sup>241</sup> Sampling is now a dominant method of economic production by the dominant culture industries. Whatever its novelty in the 1970s, the appropriation of copyrighted music (like other elements of hip-hop sound and style) has long appeared in all genres of pop music, on television, and in advertising.

### 3. *The Artistic Benefits of Restrictions*

Technical limits have historically presented obstacles for artists to overcome, resulting in innovations. For example, Public Enemy's producer Hank Shocklee prefers older digital samplers to today's computers because the older machines required creative use of limited digital memory.<sup>242</sup> As technology frees art from technical and physical constraints, man-made constraints may help inspire artists to make new kinds of meanings through new techniques. Restrictive rules, even somewhat arbitrary ones, can provide this kind of beneficial constraint.<sup>243</sup> For example, the "Hays Code," the self-censorship rules the U.S. motion-picture industry adopted in the 1920s, are sometimes caricatured as stifling and prudish.<sup>244</sup> But film scholars have come to believe that the Code helped "facilitate the insertion of potentially controversial representations into motion pictures."<sup>245</sup> Rather than eliminating controversial content, they argue, it led filmmakers to express such content through creative, stylized shorthand rather than literal, graphic images.<sup>246</sup>

Cost can be a type of beneficial restriction, as subsidizing any activity can lead to the inefficient overutilization of that activity. Subsidizing sampling may encourage its overuse and reduce incentives to develop other potential methods of cultural production. Part II above argued that law is not determinative of cultural practices. Nonetheless, assume for the sake

<sup>240</sup> *Id.*

<sup>241</sup> SIMON REYNOLDS, *RIP IT UP AND START AGAIN: POSTPUNK 1978–1984* 270 (2005). Reynolds argues that punk, like hip-hop, was a genre that quickly mutated from an anything-goes iconoclasm to a formulaic sound. *Id.* at xvii. Reynolds argues that Black Flag's 1982 album, *Damaged*, "was such a definitive hardcore statement that it served simultaneously to codify the genre [of "hardcore" punk] and render it nearly obsolete. *Id.* at 456.

<sup>242</sup> Ben Detrick, *The Dirty Heartbeat of the Golden Age*, *VILLAGE VOICE*, Nov. 6, 2007.

<sup>243</sup> See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 1–2, 175–76 (2000).

<sup>244</sup> See Norman Rosenberg, *Looking for Law in All the Old Traces: The Movies of Classical Hollywood, the Law, and the Case(s) of Film Noir*, 48 *UCLA L. REV.* 1443, 1456 (2001).

<sup>245</sup> *Id.*

<sup>246</sup> A familiar example is the use of a fade-to-black following a couple's embrace in order to imply sexual relations. See *id.*

of argument that “free culture” theorists are correct that the cost of copyright permission in the early 1990s discouraged sampling. If so, it may have *contributed* to semiotic democracy by inspiring alternatives to the then-dominant hip-hop approach. According to one hip-hop producer, legal impediments to sampling simply mean “producers have to ‘step up to the game’ and become more creative without using samples.”<sup>247</sup> The Beastie Boys, for example, played their own instruments after *Paul’s Boutique*.<sup>248</sup> While one of the band members characterized this shift as an artistic decision,<sup>249</sup> another musician has attributed it to the cost of sample clearance.<sup>250</sup> Clearance costs may have also inspired new approaches to sampling, such as DJ Shadow’s use of obscure or unrecognizable samples. Beck’s *Odelay* and the Beastie Boys’ *Check Your Head* also included samples of their own instrumental playing.<sup>251</sup> M.I.A.’s 2007 hit song, “Paper Planes,” featured a distinctive chorus built on the sampled sounds of gunshots and a ringing cash register.<sup>252</sup> Turntablist DJ Q-bert has stated that copyright law is “a challenge for us because you really have to flip the sound . . . . That’s also what makes it more beautiful as well. It makes you want to change that sound because if you just *use* it then it’s theirs and that’s stealing.”<sup>253</sup>

### C. *Subsidizing the Powerful: Markets and the Limits of Formal Equality*

Facilitating recoding (through relaxed clearance requirements or a compulsory licensing process, for example) might make it easier for the semiotically weak to participate in cultural production, but would be unlikely to increase their influence relative to the semiotic establishment—and it could even decrease it. Lowering the cost of recoding could inhibit semiotic democracy by subsidizing not only the semiotically weak and resource-poor, but also the most culturally influential members of society.<sup>254</sup> Given the greater resources and distribution networks of established media corporations, their recodings are likely to have more cultural influence than those of less powerful speakers.

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<sup>247</sup> Susan Butler, *Court Ruling Could Chill Sample Use*, BILLBOARD, Sept. 18, 2004.

<sup>248</sup> See COLEMAN, *supra* note 103, at 17, 20–21.

<sup>249</sup> See *supra* note 169 and accompanying text.

<sup>250</sup> See COLEMAN, *supra* note 103, at 17 (quoting musician Money Mark, who contributed to *Check Your Head*, as saying, “[t]he way I always heard it was that [the Beastie Boys’] accountant told them that they couldn’t make any money with all those samples, so they tried a different route”).

<sup>251</sup> COLEMAN, *supra* note 103, at 17, 20–22; NEVIN MARTELL, BECK: THE ART OF MUTATION 40 (2001).

<sup>252</sup> M.I.A., *Paper Planes*, on KALA (XL Records/Interscope Records 2007).

<sup>253</sup> KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP, AND INTELLECTUAL PROPERTY LAW 95 (2001).

<sup>254</sup> See Madow, *supra* note 1, at 240 (citing JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW 115 (1991)).

The use of sampling in hip-hop plays an important role in the discourse about recoding and semiotic democracy because hip-hop is often viewed as the paradigm of a “minority discourse,” in terms of race, class, politics, and artistic values.<sup>255</sup> As a “minority discourse,” it is simultaneously essentialized as inherently oppositional to “mainstream” law and culture. But hip-hop is not a pure cultural underdog. Like much of American pop culture, it has deep African-American roots, and much of hip-hop music has nominally oppositional content. But much of it—and certainly most of that which attracts the attention of the law—is also a commercial product sold by multinational corporations.<sup>256</sup> It can be, in hip-hop parlance, both the player and the played—often simultaneously. As music critic Robert Christgau wrote as early as 1986, “to fuss about the exploitation of hip-hop is quite often to take sides against the hip-hoppers themselves.”<sup>257</sup>

As one scholar has argued, academic commentary tends to focus on “general societal (i.e., social, political, and economic) conditions that made hip-hop an attractive proposition for inner-city youth,”<sup>258</sup> and has failed to consider the influence of technology and artists’ “specific aesthetic goals.”<sup>259</sup> Thus, commentators often assert that turntables and samplers spread semiotic democracy because they are affordable and do not require musical training.<sup>260</sup> The suggestion that sampling is socioeconomically determined and easy to do—rather than a conscious, sophisticated artistic choice—implicitly denies hip-hop the status of “art” and denies its practitioners the status of “artists.” Furthermore, it perpetuates stereotypes of African-Americans as poor and uneducated.

In fact, not only were pioneering hip-hop artists highly creative, many of them came from educated, middle-class and upper-middle class backgrounds.<sup>261</sup> In addition, the belief that sampling first emerged as a cheaper and easier alternative to traditional music-making is more myth than fact. Hip-hop DJing may have originated in the housing projects of the Bronx, but the turntables, mixers, amplifiers and record collections of hip-hop DJs were *not* affordable, everyday items: they were the specialized

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<sup>255</sup> See SCHLOSS, *supra* note 47, at 17; Greene, *supra* note 97, at 383 (referring to rap music as “one of today’s primary Black art forms”).

<sup>256</sup> Cf. CHANG, *supra* note 15, at 447 (“At the turn of the century, the hip-hop generation was now at the center of a global capitalist process generating billions of dollars in revenues.”).

<sup>257</sup> *Id.* at 407 (quoting Robert Christgau, in 1986).

<sup>258</sup> SCHLOSS, *supra* note 47, at 17.

<sup>259</sup> *Id.* at 2.

<sup>260</sup> See, e.g., FISHER, *supra* note 182, at 30; VAIDHYANATHAN, *supra* note 10, at 138; see also LESSIG, *supra* note 4, at 270 n.10 (citing VAIDHYANATHAN).

<sup>261</sup> Run DMC, LL Cool J, and Russell Simmons, co-founder of the influential Def Jam label, are from middle-class neighborhoods in Queens, New York. CHANG, *supra* note 15, at 231. The members of Public Enemy, De La Soul, and Rick Rubin (co-founder of Def Jam) are from prosperous parts of Long Island; some of the members of Public Enemy met as college students. *Id.* Note also that important hip-hop pioneers such as the Beastie Boys, Rick Rubin, and Steve Stein were not black.

(and expensive) tools of professional entertainers.<sup>262</sup> Digital sampling was introduced into popular music by established, professional music producers, and not by a grassroots artistic movement.<sup>263</sup> Digital sampling equipment, like any other cutting-edge technology, was extremely expensive and difficult to use when it first appeared: the pioneering Fairlight sampling synthesizers originally cost between \$50,000 and \$100,000.<sup>264</sup> Even today, a professional-quality digital sampler and the computer equipment required to manipulate samples can cost thousands of dollars.<sup>265</sup> Sampling may have expanded the toolbox of music professionals, but it did not necessarily make musicianship more broadly accessible. The suggestion that music-making was closed to the poor or untrained until the advent of sampling technology is an odd one: whether garage rockers or “folk” musicians, untrained musicians have always made compelling music with inexpensive or homemade instruments.

Whatever its benefits in terms of efficient production, reducing the cost of appropriation could potentially have negative distributional effects in terms of both wealth and semiotic influence, as it would subsidize wealthy and powerful artists and record labels, as well as the less influential. Rosemary Coombe argued that recoding requires protection because it implicates the “quintessentially human . . . capacity to make meaning, challenge meaning, and transform meaning . . . .”<sup>266</sup> But when a multinational corporation recodes the work of a relatively powerless individual, recoding can pose a threat to human self-realization.

Although hip-hop music and sampling continue to exist in independent, less commercial forms, commercially successful music is more likely to appear as the subject of litigation or legislative reform because it implicates large amounts of money. Commercially successful recordings embody a contradiction in that they offer artists a platform for

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<sup>262</sup> See CHANG, *supra* note 15, at 68–69 (describing the extensive equipment used by Kool Herc and his father, Keith Campbell, the sound engineer for a rhythm-and-blues band); see also LLOYD BRADLEY, *BASS CULTURE* 36–37, 141–42 (2000) (arguing that the importance of amplification technology to Jamaican DJs influenced hip-hop through Jamaican immigrants like the Campbells).

<sup>263</sup> Digital sampling appears to have been introduced into commercially recorded pop music in 1983 when the British record producer Trevor Horn produced the song “Beat Box” for *The Art of Noise*. Horn was formerly a member of the 1970s rock groups The Buggles and Yes. See REYNOLDS, *supra* note 241. “Beat Box,” which was built around a sampled and looped drum break, influenced hip-hop when it became a favorite of break dancers. *Id.* The first use of digital sampling in a rap record appears to have been Marley Marl’s production of MC Shan’s “The Bridge” in 1986. See CHANG, *supra* note 15, at 256.

<sup>264</sup> Fairlight Instruments, *History (and future)*, FAIRLIGHTINSTRUMENTS.COM, <http://www.fairlightinstruments.com/history.html> (last visited Sept. 8, 2011); see also CHANG, *supra* note 15, at 256 (describing early Fairlights as “prohibitively expensive”).

<sup>265</sup> Vaidhyathan inadvertently attests to the cost of digital sampling when he states, apparently without irony, that “[a]ll a young composer needed was a thick stack of vinyl albums, a \$2000 sampler, a microphone, and a tape deck.” VAIDHYANATHAN, *supra* note 10, at 138 (emphasis added).

<sup>266</sup> Coombe, *supra* note 7, at 1879.

semiotic influence, but ultimately increase the semiotic influence (and wealth) of record companies (which, in the case of the most successful recordings, tend to be multinationals). The pioneering DJ Afrika Bambaataa claims to have turned away inquiries from record labels for some time before eventually becoming a recording artist, because he feared recordings would reduce attendance at his successful live shows—that is, that they would transfer the value of his labor from himself to a record label.<sup>267</sup> Subsidizing recoding can exacerbate this regressive redistribution of wealth. As the Sixth Circuit noted in *Bridgeport*, samples are valuable to music producers because they offer a way to obtain the sound of a musician without employing any musicians.<sup>268</sup> In this way, sampling shares much in common with automated production methods in other industries.

“*Rapper’s Delight*” embodies the contradictions of commercially successful hip-hop records. On the one hand, it was the debut of a group of unknown performers, released by a small, black-owned, independent record label, and gave hip-hop music its first worldwide exposure. On the other hand, it can be blamed for transforming a participatory underground cultural movement into a watered-down and passively consumed commercial product.<sup>269</sup> Even in its day, the record was derided by many hip-hop artists and fans as a weak commercial imitation of hip-hop culture.<sup>270</sup> At the time, live hip-hop was well established in the Bronx and in the downtown Manhattan art scene. Many hip-hoppers thought the very idea of recordings absurd, however, because hip-hop was not a type of music so much as an interactive live experience.<sup>271</sup> The owner of Sugarhill Records, Sylvia Robinson, assembled the Sugarhill Gang for the express purpose of capitalizing on the genre. Robinson, who was from New Jersey, did not consider herself part of the “Bronx-centered hip-hop subculture”—by her own admission, she “didn’t know no Bronx people.”<sup>272</sup> Thus she manufactured a group, one of whose members was Hank Jackson, a pizza parlor employee. Unbeknownst to Robinson, Jackson happened to manage a hip-hop group called the Cold Crush

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<sup>267</sup> Daly, *supra* note 49, at 250 (quoting Bambaataa as saying “[n]obody would want to buy a record when they can come to a party and see it. . . . We thought that (records) would be the demise of our parties”).

<sup>268</sup> *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02, 802 n.14 (6th Cir. 2005).

<sup>269</sup> See CHANG, *supra* note 15, at 132 (arguing that after the release of *Rapper’s Delight*, “club-going turned into a more passive experience than ever” because patrons came to watch performers onstage rather than to dance).

<sup>270</sup> See *id.* at 129–34 (discussing how “*Rapper’s Delight*” was viewed as a “sham” because it “turned hip-hop into popular music” in order to “fit the standards of the music industry”); see also Daly, *supra* note 49, at 250 (“In the South Bronx, the Sugarhill Gang were regarded as underqualified ambassadors for a movement fully evolved and happily autonomous.”).

<sup>271</sup> See CHANG, *supra* note 15, at 130, 132 (quoting Chuck D, and filmmaker Charlie Ahearn).

<sup>272</sup> Daly, *supra* note 49, at 250.



Brothers, established local performers who had not yet made any commercial recordings.<sup>273</sup> Jackson allegedly plagiarized some of the lyrics on “Rapper’s Delight” from raps written by one of the Cold Crush Brothers.<sup>274</sup>

Similar contradictions arise from the fact that sampling in hip-hop often involves established musicians and multinational record labels appropriating the work of less popular and powerful artists.<sup>275</sup> Funkadelic, the group whose work, sampled by NWA, was at the heart of *Bridgeport v. Dimension Films*,<sup>276</sup> enjoyed far less commercial success than either NWA or Dimension Films—the studio that used the NWA song in a film.<sup>277</sup> The work of drummer Clyde Stubblefield (particularly on the James Brown song, “Funky Drummer”) is sampled ubiquitously in hip-hop and other popular music, yet he does not receive royalties.<sup>278</sup> Similarly, the “Amen Break,” a drum passage from an obscure funk record has been heavily sampled in hip-hop and in “drum and bass” dance music.<sup>279</sup> Neither the original artists nor their record label appear to have received any royalties from that lucrative sample.<sup>280</sup> In *Newton v. Diamond*,<sup>281</sup> the Beastie Boys used a sample without the permission of composer James Newton. While Newton is an established and respected musician, his cultural influence cannot compare to that of a major pop group like the Beastie Boys and their multinational record label. Given the tendency to essentialize hip-hop as an African-American form, it also bears mentioning that the Beastie

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* (quoting Grandmaster Caz, a member of the Cold Crush Brothers). Jackson has denied plagiarizing from Grandmaster Caz and claims he was Caz’s writing partner, but a journalist who wrote about the issue stated that Jackson’s claims are “not supported by any one of the many prominent hip-hop figures interviewed for this story.” *Id.*

<sup>275</sup> Similarly, some major rock stars and record labels plagiarized from relatively obscure blues artists, who sued and obtained favorable settlements. See, e.g., DAVE LEWIS, *THE COMPLETE GUIDE TO THE MUSIC OF LED ZEPPELIN* 14 (1994); Michael Goldberg, *Willie Dixon Sues Led Zeppelin Over “Whole Lotta Love,”* ROLLING STONE, Mar. 14, 1985, at 12. Although some commentators argue that blues music is communally authored and antithetical to intellectual property ownership, see VAIDHYANATHAN, *supra* note 10, at 123–26, these blues artists asserted their intellectual property rights to claim authorship and fight back against economic exploitation.

<sup>276</sup> 410 F.3d 792 (6th Cir. 2005).

<sup>277</sup> The film, “I Got the Hook Up,” cost an estimated \$3.5 million to make and grossed over \$10 million at the box office. The Internet Movie Database, *Box Office and Business for “I Got the Hook Up,”* IMDB.COM, <http://www.imdb.com/title/tt0131436/business> (last visited Sept. 8, 2011).

<sup>278</sup> See, e.g., Rob Thomas, *Is Sampling an Art Form or “Incredibly Lazy” Theft?* THE CAPITAL TIMES (Madison, Wis.), Jan. 28, 2010, at 15.

<sup>279</sup> See Steve Collins, *Amen to That*, M/C JOURNAL, May 2007, <http://www.journal.media-culture.org.au/0705/09-collins.php>; Nathan Harrison, *Can I Get an Amen?*, [http://nkhstudio.com/pages/popup\\_amen.html](http://nkhstudio.com/pages/popup_amen.html) (last visited Sept. 8, 2011) (sound recording from an audio installation dated 2004).

<sup>280</sup> Danuta Kean, *The Amen Break*, ALC NEWS (Spring 2011), [http://www.alcs.co.uk/news/amen\\_break.html](http://www.alcs.co.uk/news/amen_break.html) (last visited Sept. 27, 2011) (“Gregory C Coleman and Winstone’s frontman Richard L. Spencer, the copyright holder of *Amen, Brother*, have not seen a penny.”).

<sup>281</sup> 204 F. Supp. 2d 1244 (C.D. Cal. 2002); see discussion *supra* Section II.B.2.

Boys are white and James Newton is African-American.

The potential harm of compulsory licensing goes beyond regressive economic redistribution. It can also subsidize efforts of the semiotically influential to seize control over and subvert semiotic projects of the less powerful. At the time of *Grand Upright*, Biz Markie's work was distributed by Warner Brothers, while Gilbert O'Sullivan had not had a hit record in years. O'Sullivan testified that he did not want Biz Markie to use "Alone Again (Naturally)" because Biz Markie had a reputation as a comic performer.<sup>282</sup> Despite a deceptively pretty pop melody, the O'Sullivan song's lyrics are grim, written from the point of view of a man contemplating suicide.<sup>283</sup> O'Sullivan stated that he is extremely protective of the song's serious content, and has refused to license it for any humorous uses, or even for karaoke.<sup>284</sup>

Chuck D, the Public Enemy rapper who has complained about having to pay for sample clearances,<sup>285</sup> has himself filed two copyright-infringement suits on the recoding of his work. His voice was sampled in a St. Ides malt liquor commercial and in a rap song by the Notorious B.I.G. that allegedly glorified drug dealing.<sup>286</sup> At the time of the suit in the late 1990s, Public Enemy's commercial and cultural influence had significantly declined, while B.I.G., although recently deceased, was a major rap star.<sup>287</sup> Chuck D complained that the uses were both infringing and defamatory because they associated his voice with inner-city scourges that he has specifically criticized in his music.<sup>288</sup> In particular, the song about drug dealing sampled a song that Chuck D claimed was actually "about empowering young black persons through peaceful, non-violent and non-drug using means."<sup>289</sup>

Rock music provides a related example. While campaigning for reelection in 1984, Ronald Reagan claimed to admire Bruce Springsteen's songs for their "message of hope."<sup>290</sup> Reagan's comment appeared to be a

<sup>282</sup> See Nov. 25 Hearing, *supra* note 68, at 20.

<sup>283</sup> The lyrics, which are included as an exhibit in the *Grand Upright* case file, see *supra* note 68, include such lines as "God in his mercy, who if he really does exist/why did he desert me in my hour of need?" The song ends by describing the deaths of the narrator's parents.

<sup>284</sup> See Nov. 25 Hearing, *supra* note 68, at 20.

<sup>285</sup> See *supra* notes 114 and accompanying text (citing *Caught—Can We Get a Witness?*).

<sup>286</sup> See Reiss, *supra* note 115.

<sup>287</sup> See George Ciccarillo-Maher, *Public Enemy*, in 1 *ICONS OF HIP HOP: AN ENCYCLOPEDIA OF THE MOVEMENT, MUSIC, AND CULTURE* 169, 183 (Mickey Hess ed., 2007) (discussing the decline of Public Enemy as a significant force in rap as a result of the group losing "one of its central ingredients by 1990"); *Rapper's Posthumous CD Tops the Chart*, N.Y. TIMES, Apr. 3, 1997, at C16 (stating that retailers knew that Notorious B.I.G.'s posthumous CD was a "smash" the day the CD went on sale).

<sup>288</sup> See Reiss, *supra* note 115.

<sup>289</sup> *Id.*

<sup>290</sup> Francis X. Clines, *President Heaps Praise on Voters in the Northeast*, N.Y. TIMES, Sept. 20, 1984, at B20.

reference to Springsteen's song, "Born in the U.S.A."<sup>291</sup> That song is often misinterpreted as a patriotic or even jingoistic anthem, although its lyrics are actually about the indignities suffered by a Vietnam veteran in a declining and unsympathetic America.<sup>292</sup> In response to Reagan's comments, Springsteen questioned whether the President had actually listened to his music.<sup>293</sup> Nonetheless, Reagan's campaign reportedly asked Springsteen to provide an endorsement; Springsteen declined.<sup>294</sup> The campaign also reportedly asked the same of Michael Jackson, who also declined, citing a conflict with his religious beliefs as a Jehovah's Witness.<sup>295</sup> Under a compulsory licensing regime, Reagan could have used "Born in the U.S.A." or a Michael Jackson song without permission. The minority political and religious views of these artists could have been replaced by associations with Reagan and Reaganism. This hypothetical scenario becomes even more disturbing if we imagine a president who perceived the dark theme of Springsteen's song as politically threatening, and appropriated it specifically in order to "recode" it as a "message of hope."

Compulsory licensing for uses such as those cited here could obviously facilitate *expression*.<sup>296</sup> Because it would empower the culturally influential, however, it would not necessarily foster *semiotic democracy*. This proposition is distinct from the argument that an artist has a "moral right" to control her message. Individual listeners are, and should be, free to reinterpret "Born in the U.S.A." in any number of ways, including as a "message of hope." Indeed, many, if not most, listeners seem to have done so, and have succeeded in changing the cultural meaning of the song.<sup>297</sup> Similarly, they could choose to hear the dark and plaintive "Alone Again (Naturally)" as a wistful rumination on loneliness. Such recordings could be seen as examples of the public resisting and remaking messages produced by the media industry.

But recoding by incumbent politicians, major record labels, and similarly influential parties has an altogether different impact on semiotic democracy. Subsidizing such recordings would help those powerful interests reinterpret, and even "drown out" a less powerful artist's attempt

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<sup>291</sup> Jim Miller, *Pop and Jazz*, NEWSWEEK, Dec. 17, 1984, at 93.

<sup>292</sup> *Id.*

<sup>293</sup> See *Reagan's New Hero*, 16 NAT'L J. 1807, 1807 (1984).

<sup>294</sup> See *Rock Stars Reject GOP's Overtures*, ADWEEK, Oct. 29, 1984.

<sup>295</sup> *Id.*

<sup>296</sup> See, e.g., Kurt Opsahl, *Henley v. Devore: Second-Class Citizenship for Satire?*, ELEC. FRONTIER FOUND. (June 24, 2010), <http://www EFF.org/deeplinks/2010/06/henley-v-devore-second-class-citizenship-satire>.

<sup>297</sup> Radio personality Glenn Beck, for example, did not discover the intended meaning of Springsteen's 1984 song until 2010, when he denounced the song on the air. Jason Linkins, *Glenn Beck Finally Gets Around to Denouncing Bruce Springsteen*, HUFFINGTON POST (Mar. 12, 2010), [http://www.huffingtonpost.com/2010/03/12/glenn-beck-finally-gets-a\\_n\\_497360.html](http://www.huffingtonpost.com/2010/03/12/glenn-beck-finally-gets-a_n_497360.html).

to make meaning.<sup>298</sup> As Stuart Hall argued, dominant cultural institutions may lack the power to brainwash the public, but they do have disproportionate ability to influence cultural meanings by selecting and repeating the representations that the public sees.<sup>299</sup> The metaphor of alternative meanings competing in a “marketplace of ideas” is inapposite.<sup>300</sup> In the cultural context, as in the political and economic contexts, formally equal opportunity to participate does not necessarily lead to equality of influence, and can, in fact, exacerbate power imbalances. Similar criticism has been leveled at the recent *Citizens United*<sup>301</sup> decision, in which the United States Supreme Court invoked the “marketplace of ideas” metaphor<sup>302</sup> to hold that corporate political contributions could not be regulated more stringently than individuals’ contributions.<sup>303</sup> Concentration of market share and resources create a situation ripe for market failure, as well as anticompetitive behavior. The contestation of meanings would hardly be a fair competition, or even a meaningful dialogue.

Consider, for example, *The Grey Album*. Even if intellectual property law had protected Danger Mouse against EMI’s pressure to withdraw the album, he never stood a serious chance of contesting the cultural meaning of the Beatles’ *The White Album* or Jay Z’s *The Black Album*. The Beatles and Jay-Z enjoy the promotional resources, brand recognition, and

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<sup>298</sup> Cf. Madow, *supra* note 1, at 240 (asserting that if celebrities no longer controlled their likenesses under intellectual property law, “it is not only *popular* cultural practice that would be liberated” because large corporate actors would be “set free to ‘graze’ on the celebrity commons”) (citing JANE M. GAINES, *CONTESTED CULTURE: THE IMAGE, THE VOICE, AND THE LAW* 115 (1991)). *Woods v. Universal City Studios, Inc.* is another example of this process. 920 F. Supp. 62 (S.D.N.Y. 1996). In that case an architecture theorist successfully sued a movie studio for a film set that closely copied his copyrighted drawing. *Id.* at 64. “Free culture” advocates have ridiculed the decision as an example of copyright excess and a threat to semiotic democracy, see LESSIG, *supra* note 4, at 4; VAIDHYANATHAN, *supra* note 10, at 115, although the plaintiff was a relatively obscure academic and the defendant was a major movie studio that had admittedly copied his work. *Woods*, 920 F. Supp. at 63.

<sup>299</sup> See Hall, *supra* note 25, at 232–33 (arguing that dominant cultural institutions “have the power . . . by repetition and selection, to impose and implant such definitions of ourselves as fit more easily the descriptions of the dominant or preferred culture”).

<sup>300</sup> Cf. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) (“[I]f ever there were a self-operating marketplace of ideas, it has long ceased to exist. The mass media’s development of an antipathy to ideas requires legal intervention if novel and unpopular ideas are to be assured a forum . . .”).

<sup>301</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>302</sup> *Id.* at 906.

<sup>303</sup> Compare *id.* at 905 (“All speakers . . . use money amassed from the economic marketplace to fund their speech, and the First Amendment protects the resulting speech.”), with Ronald Dworkin, *The Decision that Threatens Democracy*, N.Y. REV. BOOKS, May 13, 2010, at 63 (“If corporations exercise the power that the Court has now given them, and buy an extremely large share of the television time available for political ads, their electioneering will undermine rather than improve the public’s political education.”).

distributional reach of multinational record companies, which gives them visibility in physical retail outlets, online stores, and traditional media, such as radio and television, that most independent releases lack.

New, “free” markets are no solution to concentration in existing markets. Many students of cyberspace believe that because the Internet facilitates low-cost worldwide distribution, content providers now compete on equal footing.<sup>304</sup> But traditional distribution and marketing channels, such as radio, concerts, television, movies, and the distribution of CDs in physical stores, remain important,<sup>305</sup> and all of them are dominated by a relatively few multinational corporations. These sectors have high barriers to entry and immense concentration.<sup>306</sup> Following several rounds of consolidation, sales of recorded music are dominated by four multinational corporations: Sony/BMG, Universal, Warner, and EMI.<sup>307</sup> CC Media Holdings, through its Clear Channel Radio subsidiary, owns over 150 U.S. radio stations, 140 radio stations in Australia and New Zealand, and Premiere Radio, the largest radio network in the United States.<sup>308</sup> Online music service Pandora reaches about thirteen to twenty million listeners per month—but traditional radio reaches about one hundred times as many.<sup>309</sup> Live performance, perhaps the most profitable aspect of the music industry, is now dominated by a single corporation, thanks to the 2009 merger of Live Nation, the world’s largest concert promoter and venue operator, and Ticketmaster, which dominates both artist-management and ticket sales.<sup>310</sup>

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<sup>304</sup> See LESSIG, *supra* note 4, at 119 (“Something has entered the field in a way that could make these concentrations change . . . [it is] the architecture of the Internet . . .”); see also *id.* (arguing that, due to the Internet, “the success of any particular kind of content is more convincingly a function of the desire for that content”).

<sup>305</sup> See Laurence Green, *Social Media and TV Need not be Enemies*, SUNDAY TELEGRAPH (London), Aug. 28, 2011, (Business) at 8 (“A typical Briton . . . spends 118 hours watching TV each month and just 3.3 hours on social networks.”); John Pareles, *Songs From the Heart of a Marketing Plan*, N.Y. TIMES, Dec. 28, 2008, at A1; see also Brian Stelter & Tanzina Vega, *Ad Money Reliably Goes to Television*, N.Y. TIMES, Aug. 8, 2011, at B1 (“[T]elevision is a tried and true medium for advertisers, remaining at or near historical highs in the United States.”).

<sup>306</sup> See LESSIG, *supra* note 4, at 117 (discussing how twenty-three corporations control most of the business in the radio, magazine, newspapers, and film sectors).

<sup>307</sup> Eric Pfanner, *For New Revenue, Sony and Other Labels Reach Far Beyond The Music Business*, N.Y. TIMES, July 5, 2010, at B5. The constant threat of corporate takeover may also limit companies’ willingness to take risks with new music or the development of new artists. Mike Wiser, *Frequently Asked Questions*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/faqs.html> (last visited Aug. 25, 2011); see also Andre Schiffrin, *When We Devoured Books*, in CONSUMING DESIRES 111, 116–17 (Roger Rosenblatt ed., 1999) (asserting a similar effect due to consolidation in the book-publishing industry).

<sup>308</sup> *Clear Channel Communications, Inc. Fact Sheet*, CLEAR CHANNEL, <http://www.clearchannel.com/Corporate/PressRelease.aspx?PressReleaseID=1564&p=hidden> (last visited Aug. 25, 2011).

<sup>309</sup> See Antony Bruno, *Pandora: Thinking Outside the Box*, BILLBOARD, July 17, 2010.

<sup>310</sup> Ray Waddell, *Building the Perfect Beast*, BILLBOARD, Feb. 6, 2010.

Formal equality can do little to reduce the concentration of cultural power unless this real-space oligopoly is addressed,<sup>311</sup> whether by antitrust law, technological innovations, or structural changes.<sup>312</sup> The Internet is not a panacea, because powerful members of the culture industry can import their greater resources and other real-space advantages into cyberspace.<sup>313</sup> Public Enemy encountered this reality after it abandoned its record-label contract in the 1990s and began selling its music directly over the Internet. According to Chuck D, the group has had to seek new methods of generating revenue because “we recognized the majors and corporate gluttons would slowly pour into the digital territory and try to dominate with analog tactics.”<sup>314</sup>

Although many theorists portray equal, free access as an inherent aspect of the Internet, Internet access is, in fact, subject to private gatekeepers such as commercial Internet service providers (ISPs), search engines, and others.<sup>315</sup> In cyberspace, as in real space, money buys superior access, and thus equality on the Internet seems dependent on regulation. A federal appeals court recently ruled, however, that the FCC lacks jurisdiction to require ISPs to observe “net neutrality,”<sup>316</sup> and Congress has so far been unable to pass legislation on the matter. Even if it were to become law, however, net neutrality provides only for *formal* equality of access to the Internet. By itself, it cannot make up for structural inequalities, such as access to capital, market share, and television exposure, that increase the cultural clout of established media organizations.

Of course, copyright protection can impede some semiotically disempowered persons’ attempts to exercise semiotic power. In the examples above, however, it did not. These anecdotes do not prove that

<sup>311</sup> Lessig, however, rejects a direct, antitrust-based response to media concentration. See LESSIG, *supra* note 4, at 117–19 (“There are important efficiencies to be gained by the mergers of large media interests. . . . The government has loosened its restrictions on concentration, sometimes for good economic reasons . . .”).

<sup>312</sup> TV, radio, and the like may eventually become outmoded, reducing the media oligopoly’s advantages; however, this is unlikely in the immediate future. Moreover, by that time, traditional media companies may have successfully leveraged their current advantages into dominant positions in cyberspace.

<sup>313</sup> See, e.g., Stelter & Vega, *supra* note 305 (arguing that television networks and other media companies “are getting better at taking their content and monetizing it beyond television” through Internet distribution and other means) (internal quotations omitted).

<sup>314</sup> Gail Mitchell, *Public Enemy: Q&A with Chuck D*, BILLBOARD, Mar. 20, 2010 (internal quotations omitted).

<sup>315</sup> See, e.g., Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unmediated Experience*, 78 GEO. WASH. L. REV. 697, 702 (2010).

<sup>316</sup> See Comcast Corp. v. FCC, 600 F.3d 642, 648–49 (D.C. Cir. 2010). “Net neutrality means simply that all like Internet content must be treated alike and move at the same speed over the network.” Lawrence Lessig & Robert W. McChesney, *No Tolls on the Internet*, WASH. POST, June 8, 2006, at A23.

copyright protection is (or is not) good for semiotic democracy. But they do show that it can have both positive and negative effects such that its net effect is unknown—and probably unknowable. There is a fundamental tension between offering *formally* equal opportunity of (or subsidy of) expression and *actually* broadening the range of people who engage in meaningful semiotic participation. This Article takes no position on whether strong, formally equal opportunity to speak should take categorical precedence over broadening actual participation. But it is critical to recognize that these are different policy concerns—indeed, they are different conceptions of “democracy.”

#### D. *Recoding as Both Resistance and Capitulation*

As the preceding discussion shows, a formally equal regime that is permissive of recoding can end up subsidizing the semiotically powerful as well as the weak, so its net effect on semiotic democracy is unclear. One response to this problem might be an asymmetrical regime that subsidizes appropriation by the semiotically disempowered from the semiotically powerful, but not vice versa. The important work of Madhavi Sunder and Anupam Chander suggests such an approach. For example, they are advocates of “fan fiction,” amateur works that recode characters and scenarios from copyrighted pop-culture sources,<sup>317</sup> but they also criticize the appropriation of indigenous cultural knowledge by multinational corporations.<sup>318</sup> An asymmetrical approach might allow independent musicians to sample from major-label recordings but not vice versa.

Asymmetrical access to intellectual property might address issues of wealth distribution. It would not necessarily advance semiotic democracy, however, and it might even retard it. In his seminal work on the right of publicity, Michael Madow argued that the law must choose between strict protection of celebrity images and other intellectual property, which will “strengthen the already potent grip of the culture industries over the production and circulation of meaning,” and a more permissive approach, which will “facilitate popular participation, including participation by subordinate and marginalized groups, in the processes by which meaning is made and communicated.”<sup>319</sup> The reality, however, is probably considerably more complicated. Subsidizing the semiotically weak in their

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<sup>317</sup> See Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction Fair Use*, 95 CALIF. L. REV. 597, 599 (2007).

<sup>318</sup> See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1335 (2004). In a forthcoming article, Sunder suggests that the existing intellectual property regime exhibits an unfair reverse asymmetricality: Hollywood studios seek legal action against intellectual-property “piracy” in Asia, yet Hollywood appropriates from Asian film and television with impunity. See Madhavi Sunder, *Bollywood/Hollywood*, 12 THEORETICAL INQUIRIES IN L. 275, 285–87 (2011).

<sup>319</sup> Madow, *supra* note 1, at 141–42.

use of the cultural commodities of the semiotically powerful may transfer *wealth* from the strong to the weak, at least in the short term. Regardless of its immediate economic effects, however, such borrowing may contribute to the *semiotic* dominance of the strong. Recoding can express resistance and thereby create new meanings, but at the very same time, the act of appropriating dominant cultural properties (even in order to critique them) acknowledges their cultural authority and can even further it.<sup>320</sup>

The argument that recoding, including critical recoding, can contribute to media domination does not depend on the Frankfurt School thesis that the media audience is entirely manipulated. Individuals often make choices that are rational in isolation, but which generate negative externalities that cumulate into socially negative results. Classic examples of this dynamic include traffic jams, pollution, and bank runs, in which individuals' rational, self-interested choices combine to the ultimate detriment of nearly all the individuals involved.<sup>321</sup> Similarly, even assuming that individuals freely and rationally choose to engage in isolated acts of recoding, the prevalence of recoding in the culture can result in reinforcing already dominant cultural institutions.

Many commentators who believe the law should facilitate recoding argue that it is a form of "collaborative" authorship.<sup>322</sup> By its very terms, this argument acknowledges that both the recoder *and* the author of the source material participate in the creation of the new work. Legal academics tend to see this glass as half-full, in that the recoder is performing some meaning-making function—but it is also half-empty. Even the most active engagements with texts, such as the production of innovative derivative works, involve at least *some* ceding of the meaning-making function to the author of the source work. By definition, a recoder creates some new elements, but also chooses not to create others. Pioneering hip-hop DJs like Afrika Bambaataa, for example, were recognized for their eclectic combinations of unusual and obscure records.<sup>323</sup> But even the most creative DJ or sampler cedes some of the meaning-making function to the creators of the records he plays or samples. The active, meaning-making aspect of recoding is often overstated. As Foster said of "postmodern" appropriation in the visual arts some twenty-five years ago, "many artists borrow promiscuously from

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<sup>320</sup> See *supra* notes 200–07 and accompanying text (describing Hal Foster's argument that recoding is not resistance to capitalism and its ideologies, but exemplary of them).

<sup>321</sup> See, e.g., Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231, 1243–45 (2000).

<sup>322</sup> See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 295 (1992); Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279, 279–82 (1992); Aoki, *supra* note 202, at 814.

<sup>323</sup> See Daly, *supra* note 49.



both historical and modern art. But these references rarely engage the source—let alone the present—deeply.”<sup>324</sup>

Appropriation for the purpose of engaging and critiquing the source presents a special justification for compulsory licensing. An excessively strong property rule could inhibit semiotic democracy by preventing the use of recoding to express dissent. Existing doctrine accounts for this to some extent: the Supreme Court has held that parody of the original militates in favor of a fair use defense.<sup>325</sup> More recent decisions, however, seem to expand fair use significantly beyond recodings that engage and challenge their source material. For example, a recent district court decision found fair use in a rap song that “highlights the contrast between the two worldviews [of the source and of the rapper] and expresses the rapper’s belief in the realism of his own perspective.”<sup>326</sup> The song in question adapted the song “What a Wonderful World” by altering the lyrics to celebrate marijuana use.<sup>327</sup> Even more recently, the Second Circuit stated that fair use protection may extend to works that “satirize life.”<sup>328</sup>

When recoding does challenge and critique its source, it may empower the recoder on one level, but it can simultaneously *disempower* her on another level. John Fiske argued that television’s semiotic plasticity gives the disempowered the “pleasure” of engaging in resistance to power through recoding,<sup>329</sup> but acknowledged that “[t]he resistive readings and pleasures of television do not translate directly into oppositional politics or

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<sup>324</sup> FOSTER, *supra* note 200, at 16; cf. Hughes, *supra* note 235, at 946–47 (“[I]t is important to understand better what constitutes recoding because it is possible that there actually is little recoding going on.”).

<sup>325</sup> See *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (2004).

<sup>326</sup> *Abilene Music, Inc. v. Sony Music Entm’t, Inc.*, 320 F. Supp. 2d 84, 89–92 (S.D.N.Y. 2003); see also *Bourne Co. v. Twentieth Century Fox Film Corp.*, 602 F. Supp. 2d 499, 500 (S.D.N.Y. 2009) (following *Abilene* and finding that parodists can claim fair use).

Unfortunately, fair use remains a loosely defined, equitable balancing doctrine, and establishing it in court is costly. When the musical group Negativland and its record label, SST, were sued for sampling a song by the rock group U2, Negativland insisted that its sample constituted fair use. See NEGATIVLAND, *FAIR USE: THE STORY OF THE LETTER U AND THE NUMERAL 2 23* (1995) (reproducing an original Negativland press release dated November 10, 1991). Despite this belief, SST and Negativland could not pay the costs of defending against a lawsuit. See *id.* at 21, 24. Blanket protection for recoding seems an excessive response to the cost of copyright litigation, however; after all, that cost is endemic to our legal system and not particular to copyright. As in other areas of law, the cost of litigation is addressed in limited part by *pro bono* organizations, such as the Electronic Frontier Foundation, the Stanford Law School Center for Internet and Society, and cyberlaw clinics at law schools. See *id.* at 21–22.

<sup>327</sup> *Abilene Music*, 320 F. Supp. 2d at 90.

<sup>328</sup> See *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) (holding that “the broad principles of *Campbell* are not limited to cases involving parody”); see also *Lennon v. Premise Media Corp. L.P.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008) (citing *Blanch* and finding fair use in the use of John Lennon’s song “Imagine” to criticize anti-religious sentiment generally).

<sup>329</sup> See FISKE, *supra* note 189, at 19.

social action.”<sup>330</sup> Indeed, the pleasure of recoding can, like bread and circuses, mask the pain of subordination and diminish the incentive to agitate for material change. For example, using sampling to deconstruct and critique a pop record may express frustration with the record industry, but this cathartic activity is a poor substitute for material reform of semiotic democracy, such as reducing the overconcentration in the industry.

Cultural products are not empty vessels that can be filled with any preferred meaning. Any source has a range of possible meanings—but not an *infinite* range.<sup>331</sup> Just as irony is often lost on its audience, a critical recoding may be mistaken for an endorsement or homage. The audience may even “re-recode” a critical recoding to restore the source’s conventional meaning. As noted above, Bruce Springsteen tried to give the jingoistic-sounding phrase “Born in the U.S.A.” a layered and ironic meaning, yet many of his listeners insisted on “re-recoding” it to fit its more conventional meaning.

Similarly, recoding cultural products such as copyrighted commercial music faces intractable meanings. One of those meanings is the very centrality of the media as a topic of concern. The very act of manipulating and commenting on the media, even to criticize it, acts out and furthers its cultural importance.<sup>332</sup> Insisting that we *need* corporate-created cultural commodities to express ourselves not only concedes that those commodities dominate our culture, but also, and moreover, further contributes to that domination. This turns John Fiske’s vision of semiotic democracy on its head: while Fiske saw television as liberating because it *lacked* cultural authority, today’s advocates of “free culture” argue that cultural appropriation borrowing is necessary precisely *because of*

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<sup>330</sup> *Id.* at 326. Fiske did acknowledge, however, that resistive readings could *indirectly* contribute to political change by fostering ideological diversity. *Id.*

<sup>331</sup> As Stuart Hall argued, the members of the culture industry “do have the power constantly to rework and reshape what they represent; and, by repetition and selection, to impose and implant such definitions of ourselves as fit more easily the descriptions of the dominant or preferred culture.” Hall, *supra* note 25, at 232–33; cf. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960* 106 (1994) (arguing that a legal theory in any particular historical context carries “legal and intellectual baggage” that constrains its range of possible meanings).

<sup>332</sup> Negativland, which satirizes the media through the manipulation of samples, has also been accused of falling into this trap. When Negativland and its label, SST, were sued for unauthorized sampling, the label and the group had an acrimonious falling out. See NEGATIVLAND, *supra* note 326 at 51 (reprinting an SST press release dated Feb. 3, 1992). Greg Ginn, the head of SST, argued that Negativland failed to appreciate the real material impact of the suit and failed to cooperate with SST’s lawyers. *Id.* at 52. Ginn accused them of treating the incident like another media-based “joke” and called Negativland “victims of the media cocoon that they frequently lampoon.” *Id.* at 51–52. He also stated “I suggest Negativland take a year or two off from their . . . media obsessions . . . to see how the other side lives.” *Id.* at 50–52.

commercial pop culture's cultural authority.<sup>333</sup>

Recoding popular music can also perpetuate pop music's inherently commercial, consumerist message; recoding pop music into new pop music doubles the effect. Regardless of the artist's intended meaning, the commercial nature of pop music inherently encourages its listeners to consume more, because consumption will make them happy.<sup>334</sup> As Fredric Jameson put it, "the commodity is its own ideology: the practices of consumption and consumerism, on that view, themselves are enough to reproduce and legitimate the system, no matter what 'ideology' you happen to be committed to."<sup>335</sup> Hal Foster argued that even devising alternative meanings for commodities simply furthers consumerism, because consumers value the appearance of choice and difference.<sup>336</sup> Recoding the Beatles as hip-hop music, for example, only broadens their considerable commercial appeal (and thus their cultural influence). Hip-hop artist KRS-One has said: "Rap music is something we do, but hip-hop is something you live."<sup>337</sup> For most people, however, both rap and hip-hop (as well as rock, jazz, and classical music) are primarily things they buy.

The means, like the content, of sampling can also implicate both autonomy and domination. Like commercial pop hits, the very technology of digital sampling consists of commercial commodities (hardware and software). Moreover, sampling is not just a method of individual expression through recoding, but also the manner by which much commercial pop music is produced. Digital sampling became a relatively affordable and user-friendly "democratic" technology only *after* it transformed from a tool for innovative (and elite) cultural practice into a common method of producing commercial music. A similar analysis may apply to technology more generally: the forces that make technological advances affordable and accessible are the same forces that transform them from subversive innovations into commonplace commodities.

The foregoing argument is not meant to suggest that recoding is necessarily less creative than reiterative. It is meant only to emphasize that it can *both* create new meanings *and* promulgate the ideas of the culture industries—and thus simultaneously advance and retard semiotic

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<sup>333</sup> When asked by a copyright owner's lawyer why he did not create original characters and scenarios, one fan fiction author replied that "an original work would not have the kind of community fan fiction automatically creates between reader and writer." Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997).

<sup>334</sup> Cf. Ben Watson, *Decoding Society Versus the Popsicle Academy: On the Value of Being Unpopular*, in LIVING THROUGH POP 79, 86 (Andrew Blake ed., 1999) (arguing that positive record reviews "are in effect calls to earn money: to work harder").

<sup>335</sup> Fredric Jameson, *Architecture and the Critique of Ideology*, in 2 THE IDEOLOGIES OF THEORY: ESSAYS, 1971–1986 35, 54 (1988) (attributing the phrase "the commodity is its own ideology" to Theodor Adorno).

<sup>336</sup> FOSTER, *supra* note 200, at 171.

<sup>337</sup> KRS-ONE, *Hip-Hop Knowledge*, on THE SNEAK ATTACK (Koch Records 2001).

democracy. Intellectual property theorists posit hip-hop, and particularly its use of sampling, as an ideal example of an oppositional practice—one that is free and genuine—in contrast to conformist, manufactured commercial culture. As Stuart Hall argues, however, “there is *no* whole, authentic, autonomous ‘popular culture’ which lies outside the field of force of the relations of cultural power and domination.”<sup>338</sup> He went on to conclude, “[t]he danger arises because we tend to think of cultural forms as whole and coherent: either wholly corrupt or wholly authentic.”<sup>339</sup> Cultural practice is internally conflicted; it embodies a constant “dialectic of cultural struggle” between domination by the culture industries and resistance by the mass audience.<sup>340</sup>

“Free culture” commentators take an extreme opposite view, and consider commercial music, television, movies, and the like to be “our culture.”<sup>341</sup> In some very important senses they are “ours.” We, as audience members, make some contribution to making their meanings. Furthermore, for better or worse, they provide many (if not most) of the shared aesthetic experiences and ideas that help constitute us as individuals and communities. But they are also commodities like fast food, sneakers, or appliances, which are produced by multinational corporations and marketed to us primarily to generate corporate profits. It is true that we use copyrighted material, such as musical recordings, books, and TV to realize and define ourselves.<sup>342</sup> However, that argument only tells us that intellectual property has a significant cultural influence; it does not begin to address whether that influence is positive. Nor does it explain why our consumption of intellectual property should be subsidized when so many other things with comparable influence are not, such as homes, clothing, or automobiles.

Richard Stallman, one of the originators of the noncommercial GNU operating system, argued for software that is “free” in the sense that “it respects the users’ essential freedoms: the freedom to run it, to study and change it, and to redistribute copies with or without changes.” According to Stallman, “This is a matter of freedom, not price, so think of ‘free speech,’ not ‘free beer.’”<sup>343</sup> Lawrence Lessig maintains that his vision of “free culture” is also more like “free speech” than “free beer.”<sup>344</sup> But

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<sup>338</sup> Hall, *supra* note 25, at 232–33.

<sup>339</sup> *Id.* at 33.

<sup>340</sup> See *id.* at 233–34.

<sup>341</sup> LESSIG, *supra* note 4, at 9 (quoting, with approval, the Apple advertising slogan, “Rip, Mix, Burn, . . . After all, it’s your music”).

<sup>342</sup> See Aoki, *supra* note 202, at 837–38.

<sup>343</sup> Richard Stallman, *Why Open Source Misses the Point of Free Software*, GNU OPERATING SYSTEM, <http://www.gnu.org/philosophy/open-source-misses-the-point.html>.

<sup>344</sup> LESSIG, *supra* note 6, at xiv (citing RICHARD STALLMAN, *FREE SOFTWARE, FREE SOCIETIES* 57 (2002)).

although reducing intellectual property protections would facilitate expression in some ways, it would do so in large part by reducing the prices of commodities like music and movies. Free culture is like free beer in this sense. Giving away some beer for free transfers wealth to drinkers in the short run, but, in the long run, it may increase the demand for beer to the benefit of sellers and at the expense of drinkers (and of society as a whole). Similarly, free culture involves subsidizing commodities for the short-term benefit of individuals as consumers, but it may act in the longer term as a transfer of both cultural power and wealth to sellers at the expense of the audience and of society generally. Thus, a legal regime that limits consumption through prices may in fact be salutary.<sup>345</sup>

Because media culture is a product we consume rather than make (at least not entirely), it is not entirely “our” culture. The problem is not an aesthetic one: many commercial cultural products are of excellent artistic quality (and much “independently” produced culture is not). Rather, the problem is one of political power: even as we participate in creating meaning on some level, we simultaneously delegate some of the meaning-making function to professionals—that is, we choose to buy (or take) meaning rather than make it.

Recoding not only fails to completely reject the dominant discourse, but can also serve to *reinforce* the dominance of the culture industry’s discourse by adopting and further disseminating it. Indeed, it can even serve to help market it. Stallman has identified this problem in the software context. He warns that the “open source” software movement often fails to serve the goal of “free” software.<sup>346</sup> “Open source” refers to software whose source code is made available so users may tinker with it and collectively make the software more “powerful and reliable.”<sup>347</sup> Although open source is often conflated with free software, Stallman contrasts the “purely practical values” of open source with free software’s categorical commitment to user freedom. An open source philosophy can result in users participating in the curtailment of their own freedom, in direct contradiction of the free software philosophy. For example, an open-source approach is often used to perfect proprietary software—i.e., software that is “un-free” in both senses: the owner both charges money for it and restricts its dissemination and use.<sup>348</sup> Furthermore, open source participants may help perfect proprietary software that includes “malicious features” that compromise users’ freedom, “such as spying on the users,

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<sup>345</sup> But see Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 813–17 (2010) (criticizing intellectual property law on the grounds that it raises prices and thus restricts consumption of certain goods).

<sup>346</sup> Stallman, *supra* note 343.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

restricting the users, back doors, and imposed upgrades.”<sup>349</sup> According to Stallman, some open-source advocates have even proposed an open-source approach to “digital restrictions management” (DRM) software—the very programs that prevent users from copying software, music and movies.<sup>350</sup>

Some free-culture advocates demonstrate the kind of contradictions Stallman identifies in the open-source movement. Even as they espouse semiotic democracy, they often laud recoding for increasing the revenues and influence of the culture industries.<sup>351</sup> For example, one commentator defends sampling on the ground that it can “revive[] the market for an all but forgotten song or artist.”<sup>352</sup> Similarly, some copyright commentators defend unauthorized file sharing of copyrighted music on the ground that illegal downloads expose listeners to new music and thus have a positive marketing effect.<sup>353</sup> Like Stallman’s open-source tinkerers, these are examples of users giving industry free product-development and marketing services that contribute to industry’s domination of the user.

As noted above, “Rapper’s Delight,” originally released in 1979, is rapped almost entirely over a note-for-note imitation of Chic’s “Good Times,” one of that year’s most popular songs. “Rapper’s Delight” gave increased exposure to an already dominant cultural trope in pop music at the time, and further cemented the “Good Times” melody in the public consciousness. Imani Coppola (who once had a sample-based hit song) argues that record companies encourage sampling in order to squeeze new forms of revenue out of songs with proven market power, stating “[i]t’s just a money-making scheme for record companies who are like, [‘]If they loved it once before, they’re gonna love it again.”<sup>354</sup>

Similarly, while *The Grey Album* recoded albums by Jay-Z and the Beatles, it simultaneously testified to those artists’ cultural importance and provided them with additional exposure. It also made the older music of the Beatles relevant and appealing to younger audiences.<sup>355</sup> Similarly, the

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* Software and media companies refer to this software as “digital *rights* management” software, but many free-software advocates prefer the more ominous mirror-image term “digital *restrictions* management” to emphasize that DRM limits freedom of use. See, e.g., *What is DRM? Digital Restrictions Management*, DEFECTIVEBYDESIGN.ORG, [http://www.defectivebydesign.org/what\\_is\\_drm](http://www.defectivebydesign.org/what_is_drm) (last visited Nov. 9, 2011).

<sup>351</sup> Similarly, many free-culture advocates believe “fan fiction” furthers semiotic democracy. See, e.g., Chander & Sunder, *supra* note 317, at 600; Coombe, *supra* note 7, at 1877; Tushnet, *supra* note 341, at 655–58. They do not consider that fan fiction may ill-serve semiotic democracy by “keep[ing] its consumers excited about the official shows, receptive to other merchandise, and loyal to their beloved characters.” *Id.* at 669. Paramount Pictures takes a permissive stance toward “Star Trek” fan fiction for these very reasons. *Id.*

<sup>352</sup> VAIDHYANATHAN, *supra* note 10, at 144.

<sup>353</sup> See, e.g., LESSIG, *supra* note 6, at 68–71.

<sup>354</sup> *Id.*

<sup>355</sup> See MCLEOD, *supra* note 57, at 153 (college radio stations added *The Grey Album* to their playlists, exposing young college students to the music of The Beatles).

“mashup” music of Girl Talk (ironically, one of the few sample-based musicians to expressly invoke fair-use doctrine) derives its appeal precisely from the familiarity of well-known songs. Gillis himself has said, “I always wanted to use recognizable elements and play with people’s emotional, nostalgic connections with these songs.”<sup>356</sup> By deriving its appeal from the appeal of these existing songs, his work exploits, confirms, and perpetuates their cultural influence.

Certain sample-based recordings, including *The Grey Album*, present the tension between autonomy and domination even more starkly in that they not only give exposure to established music, but also directly act out the promotional strategy of the culture industry. While the sampling of the Beatles’ music was unauthorized, Jay-Z himself freely provided the vocal tracks: when he released *The Black Album* in 2003, Jay-Z (and his record company) also released *The Black Album: Acappella* (sic) a vocal-only version of the album, and invited anyone to “remix the sh-t out of it.”<sup>357</sup> Releasing a *cappella* versions and other remix-ready recordings has become a popular promotional tool, because “the labels making these records want to make it as easy as possible for deejays to remix their songs.”<sup>358</sup> This accessibility increases plays of the record by nightclub DJs, which can increase record sales.<sup>359</sup> *The Grey Album* (and other remixes that use authorized recordings) are sometimes portrayed as subversive of established artists and record companies, but in fact they are much more conflicted.

The EMI record label had objected to *The Grey Album*, but it soon followed Jay-Z and took the recoding-as-marketing concept to its logical extreme. Purchasers of Lily Allen’s 2008 EMI album, “It’s Me, It’s You” received online access to MP3 versions of the album’s component tracks. EMI invited fans to remix the tracks and submit them via a website. EMI claimed exclusive intellectual property rights in any remixes submitted, and expressly reserved the right to release them commercially without compensation to the remixer.<sup>360</sup> That is, as part of the album purchase, consumers were purchasing the opportunity to provide EMI with free labor to create products that EMI could then sell back to the consumer. It is difficult to claim to have engaged in “subversion” when the target has not only consented to, but actually initiated the engagement in order to further its business at your expense. Indeed, these uses of remixing are very literal

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<sup>356</sup> Dorian Lynskey, *A Little Bit of This, a Little Bit of That*, GUARDIAN, Oct. 24, 2008, at 5.

<sup>357</sup> MCLEOD, *supra* note 57, at 153.

<sup>358</sup> Eric Gwinn, *A Little of This, a Sample of That—Mashups are Do-it-Yourself*, CHI. TRIB., Oct. 13, 2005, (At Play) at 13.

<sup>359</sup> *Id.*

<sup>360</sup> The terms and conditions are available on EMI’s Lily Allen website. *Lily Remix: Terms and Conditions*, LILLYALLENMUSIC.COM, <http://www.lilyallenmusic.com/lily/remix/terms> (last visited Nov. 9, 2011).

examples of Hal Foster's admonishment that "to manipulate [an object's] differences hardly constitutes resistance, as is commonly believed: it simply means you are a good player, a good consumer."<sup>361</sup>

Of course, not every form of activity has to advance semiotic democracy. In moderation, the pleasures of watching television, writing fan fiction, or remixing a hit pop song may outweigh their marginal negative social effects. But in this way they are merely guilty pleasures, more like eating junk food, drinking beer, or driving a big car, and less like meaningful expressive or political activities worthy of special legal concern. Academic commentators protest too much when they insist that practically every use of cultural content—even passive consumption<sup>362</sup>—constitutes a meaningful exercise in cultural *participation*.

As the foregoing discussion demonstrates, the debate over who controls the products of the culture industry is a distraction from a deeper question—to what extent do such products control *us*? One commentator has argued that copyright's prohibitions on unauthorized derivative works violate the First Amendment because they restrict "freedom of imagination."<sup>363</sup> But one's imagination might also be shackled by dependence on commercial tropes—and restrictive intellectual property laws might actually break those bonds. Indeed, one might ask whether semiotic democracy is better served by encouraging the public to critique popular culture or by encouraging them to ignore it and fashion alternatives to it. A logical, if politically unrealistic, approach to this problem would be to fund arts education through a tax on media consumption, in much the same way some public-health programs are funded through taxes on cigarettes.<sup>364</sup>

#### IV. CONCLUSION: LAW, MARKETS, AND LIBERALISM

The new "free culture" orthodoxy in copyright theory places too much faith in law's ability to restrict and to empower. This may have something to do with the foundational metaphor of "intellectual *property*:" copyright

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<sup>361</sup> FOSTER, *supra* note 200, at 171.

<sup>362</sup> Many commentators argue that even relatively passive uses, such as the unauthorized file sharing of copyrighted music, constitute cultural participation that deserves protection from copyright infringement actions. But they simultaneously argue that these passive uses should be protected because they benefit the media industry, and they seem oblivious to the tension between these two kinds of arguments. See LESSIG, *supra* note 6, at 70–74 (arguing that file sharing has numerous benefits to the record industry including exposing fans to new music); MCLEOD, *supra* note 57, at 296–303 (discussing the lack of statistical connections between illegal file sharing and decreases in record sales); VAIDHYANATHAN, *supra* note 10, at 179–82 (positing that music file sharing enables fans to become exposed to new bands, which benefits the music industry).

<sup>363</sup> Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 4 (2002).

<sup>364</sup> See, e.g., CAL. REV. & TAX. CODE § 30461.6 (West Supp. 2011).



and the like are seen as “property” law—a system of entitlements imposed upon individuals, either by “nature” or by the state. Conversely, in the theory of corporate and business law, business entities and related legal rights are commonly described under the rubric of “contracts”—rights created by the consent of the parties. Thus, the influence of law and other rules tends to be overstated in the intellectual property context and understated in the business law context, while the influence of private solutions or “contract” tends to be understated in intellectual property scholarship and overstated in business law scholarship.

Intellectual property scholars exaggerate copyright doctrine’s ability to restrict artistic and business practice. Academic commentary on *Grand Upright* and other law related to sampling assumes that individuals cannot bargain around legal entitlements or make decisions about cultural participation on grounds other than immediate legal and financial cost. But the history of sampling suggests both these assumptions are untrue. Sample clearance requirements did not spell the end of musical recoding; indeed, sampling evolved under such requirements. Hip-hop artists and labels acknowledged the cost of appropriation—and worked out payment practices—long before any courts ordered them to do so. Furthermore, there is no reason to assume that the cost of licensing was, or is, the determinative factor in hip-hop’s recoding practices. Artistic and commercial factors were undoubtedly also at work.

Legal scholars also tend to overstate the ability of copyright reform to equalize the distribution of semiotic power in society. They follow the liberal assumption that power imbalances can be corrected by market forces as long as legal background rules are formally equal. Under this view, if the law puts everyone on formally equal footing, “private” forces (such as the concentrated media industry) are by definition unable to restrict individual freedom, because “market” forces inevitably reach free and fair outcomes. Thus, formally equal opportunities to participate in culture (such as by recoding) are sufficient to advance semiotic democracy. This model downplays the possibility that existing disparities in cultural influence and financial resources curtail the ability of the disempowered to take advantage of formally equal opportunities, and that formal equality in a context of substantive inequality can even increase opportunities for the powerful to exploit the disempowered. Furthermore, even if the disempowered exercise a legal entitlement to recode, that exercise can simultaneously embody both resistance *and* capitulation to the dominance of commercial culture.

An intellectual property regime that encourages cultural appropriation can have both positive and negative effects on semiotic democracy—whether it is formally equal, or whether it asymmetrically empowers the semiotically weak to appropriate. The effects are so subtle and speculative that it is probably futile to attempt to calculate the *net* effect of an

appropriation-rights regime. Thus the argument that recoding advances semiotic democracy is not necessarily wrong, but it cannot really be proven to be right or wrong.

Intellectual property theorists overstate individual autonomy with respect to acts of cultural appropriation, but understate the autonomy of the individual in the face of intellectual property law. This apparent inconsistency may be reconciled in light of liberal-individualist belief that the state poses a special threat to liberty and that non-state actors have only limited ability to do so.<sup>365</sup> So although they identify the concentrated culture industry as a threat to semiotic democracy, they believe this imbalance is the product of legal doctrine (i.e., copyright law) repressing the individual. Thus they believe it can be corrected by formally equal legal entitlements and free markets. Despite its appropriation of radical terminology, the “free culture” project is, in fact, a fundamentally liberal-capitalist one.

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<sup>365</sup> See Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355, 356 (2000).

